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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 54

E. FORREST MITCHELL, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, PETITIONER,

vs.

BERTHA E. MAUBER AND INTERNATIONAL RE-INSURANCE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAR. 31, 1934.

CERTIORARI GRANTED APRIL 9, 1934.

SUPREME COURT OF THE UNITED STATES

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[fol. 3]

IN UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In Equity

No. Z 95 C

BERTHA E. MAURER, Complainant,

vs.

INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation, Respondent

PETITION FOR APPOINTMENT OF ANCILLARY RECEIVER—Filed April 19, 1933

To the Honorable Judges of the District Court of the United States, for the Southern District of California:

The petition of Arthur G. Logan, Carl M. Hansen and George de Bienzille Keim respectfully shows to this Honorable Court:

1. That on the 19th day of April, 1933, your petitioners by an order duly made in the court of chancery of the State of Delaware, in and for New Castle County, were duly appointed Receivers of the assets, estate and effects of the above named respondent in the above entitled action.

[fol. 4] 2. Your petitioners have duly accepted the trust in them reposed and have duly qualified as such Receivers and have filed the bond as directed in said order.

3. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Delaware and engaged in a general casualty insurance and suretyship business in the County of Los Angeles, State of California, as well as elsewhere in said state and in the United States.

That said respondent has an office located in the City of Los Angeles, State of California, and within the jurisdiction of this court.

4. That on the 19th day of April, 1933, a bill of complaint was duly filed in the court of chancery of the State of Delaware, in and for New Castle County, against said respondent for the purpose of having a receiver or receivers appointed of all and singular the property and assets of every nature and wheresoever situated of the said respondent.

5. That the nature of the cause of action is more particularly referred to in the bill of complaint in the aforesaid action, an exemplified copy of which is being forwarded to this jurisdiction and which will be presented to this court when the same is received, permission to make such presentment being hereby expressly requested.

6. That simultaneously with the filing of said bill of complaint an application was made for the appointment of a receiver and that your petitioners were duly appointed as such receivers, as set forth in paragraph I hereinabove mentioned.

7. That the respondent owns and possesses property consisting of land, buildings, securities, moneys in banks, [fol. 5] pledges, accounts receivable and other assets, together with furniture and fixtures, all of which are located in the City of Los Angeles, State of California, and your petitioners are informed and verily believe that certain creditors are threatening suits against the said property and that attachments are about to be issued or may be issued against the said property as there are considerable outstanding and past due obligations. In the event suits are brought this respondent will have no valid or legal defense and if such attachments are issued the creditors of this estate, as well as your petitioners, will sustain irreparable damage and loss by reason of court costs and the damage incident to such interference with the property of the respondent.

8. That in the opinion of your petitioners the property, assets and effects of respondent located in Los Angeles are worth in excess of secured and unsecured debts in the neighborhood of about two million dollars.

9. Your petitioners are of the opinion and verily believe that it is absolutely necessary for the preservation of the property of the respondent and the protection of the creditors interested herein that ancillary receivers be appointed by this Court.

10. That a certified copy of the order appointing your petitioners as such receivers, with a certification as to the due approval of the bond of your petitioners as such receivers, as well as an exemplified copy of the bill of complaint referred to above, together with a certified copy of the answer interposed by the respondent herein, are being forwarded to this jurisdiction and will be presented to this court when received, permission to make such presentment being hereby expressly requested.

[fol. 6] 11. That no previous application for such order has heretofore been made.

Wherefore, your petitioners pray for an order of this court appointing ancillary receivers of all the property, assets and effects of the above named respondent which are situated within this jurisdiction, to care for and preserve the same until the further order of this court, and for an order of this court directing the agents and employees and all other persons, including creditors, to deliver into the possession of the ancillary receivers so appointed all the property of the said respondent which is not exempt by law, and otherwise to comply with the terms of the said order, and that the respondent, its agents, servants and employees and all persons be restrained and enjoined from in any way interfering with the possession of the said property other than to turn the same over to the said ancillary receivers.

Dated April 18, 1933.

Newlin & Ashburn, C. J. Harrison, Attorneys for said Petitioners.

Duly sworn to by C. J. Harrison. Jurat omitted in printing.

[fol. 7] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER APPOINTING ANCILLARY RECEIVERS—Filed April 20, 1933

Upon the bill of complaint filed in the above entitled action in the Court of Chancery of the State of Delaware in and for the County of New Castle upon the certified copy of the order appointing Arthur G. Logan, Carl M. Hansen and George de Bienzille Keim, Receivers of the assets, estate and effects of the above named respondent, and upon the original order appointing such receivers filed in the Court of Chancery of the State of Delaware in and for the County of New Castle and upon the certificate of the Clerk of said court of the filing and approval of the bond of the [fol. 8] said receivers, and upon reading and filing the petition of Arthur G. Logan, Carl M. Hansen and George de Bienzille Keim, and on motion of Messrs. Newlin & Ashburn, attorneys for said receivers,

It is ordered, adjudged and decreed that George de Bienzille Keim and W. H. Comstock be and they hereby are appointed ancillary receivers of International Re-Insurance Corporation, a corporation organized and existing under and by virtue of the laws of the State of California, with all rights and powers to carry into force and effect the order of the original court of jurisdiction, and

It is further ordered, adjudged and decreed that the said ancillary receivers George de Bienzille Keim, and W. H. Comstock furnish a bond in the sum of $50,000.00 each, for the faithful performance of their duties as such ancillary receivers, and

It is further ordered, adjudged and decreed that the respondent its agents and employees and all other persons including creditors of the respondent are hereby required and commanded forthwith to deliver all property of every nature belonging to respondent to the said ancillary receivers, and

It is further ordered, adjudged and decreed that the said respondent and each and every of its agents and employees, and all the creditors of the respondent and all marshals, sheriffs, constables, commissioners and all deputies and servants and all other servants and generally all persons, firms and corporations whatsoever are hereby enjoined from removing, transferring, disposing of or attempting

to remove, transfer or dispose of, or in any way interfere with any of the property of the respondent, or from doing [fol. 9] anything whatsoever, or from doing anything of any nature to interfere with the possession and control of the said ancillary receivers of the property of the said respondent, and

It is further ordered, adjudged and decreed that the said ancillary receivers shall have leave to apply to this court for further orders and authority at any time hereafter as may be deemed by this court proper, and shall comply with all orders of the court of original jurisdiction.

Dated April 19th, 1933.

Geo. Cosgrave, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AMENDMENTS TO BILL OF COMPLAINT—Filed April 25, 1933

To the Honorable Judges of the District Court of the United States for the Southern District of California:

Come now Arthur G. Logan, Carl M. Hansen and George de Bienzille Keim, and with leave of court first had and obtained file the following amendments to their original bill of complaint heretofore filed herein:

I

Amendments to paragraph 1 thereof by adding the words "and decree" after the word "order", page 1, line 20; by [fol. 10] striking therefrom "in the above entitled action", page 1, line 23, and adding thereto the words "in an action in said Court of Chancery entitled 'Bertha E. Maurer, complainant, vs. International Re-Insurance Corporation, a corporation created by and existing under the laws of the State of Delaware, respondent', with authority and power, among other things, to apply for and obtain the appointment of an ancillary receiver or ancillary receivers of the said respondent, International Re-Insurance Corporation, in any jurisdiction or jurisdictions in which said respondent may have property".

II

Amendment to paragraph 3 thereof by adding the words "herein, International Re-Insurance Corporation" after the word "respondent" page 2, line 2.

III

Amendments to paragraph 4 thereof by striking the words "on the 19th day of April 1933", page 2, line 3, therefrom and substituting in place thereof "on the 23rd day of March, 1933", and by inserting the words "by said Bertha E. Maurer" after the word "county" page 2, line 5.

IV

Amendment to paragraph 5 thereof by striking therefrom everything therein after the word "is", page 2, line 11, and substituting therefor the words "hereto annexed and made a part thereof by reference".

V

Amendments to paragraph 7 thereof by striking therefrom the words "all of which are", page 2, line 22, and by inserting therein after the word "California", page 2, [fol. 11] line 23, the words "that certain creditors of said respondent have commenced suits and levied attachments on said assets", and by inserting the words "to many of said actions" after the word "defense", page 2, line 29.

VI

Amendments to paragraph 9 thereof by inserting the words "for the reasons above set forth" after the word "necessary" page 3, line 7; by inserting after the word "that", page 3, line 9, the words "that this court assist and lend its aid in enforcing the aforesaid decree of the Chancery Court of the State of Delaware by gathering together the assets of said respondent, International Re-Insurance Corporation, herein within the jurisdiction of this court, or causing the same to be gathered together and administering and marshaling the same, taking such steps with respect to the property and assets of said respondent as to this court shall seem meet and proper to protect the interests of the creditors of said respondent

in this jurisdiction, and causing the net balance of said property and assets, after such steps as this court may take in the interests of creditors of respondent in this jurisdiction, to be delivered to the court of primary jurisdiction, to-wit, the Chancery Court of the State of Delaware, and for the purpose of protecting and preserving the assets of respondent within the jurisdiction of this court from dissipation and waste until this court makes its final determination on the bill here presented that", and by adding to said paragraph after the word "court" page 3, line 10, the words "to take possession of said property and assets and administer the same in accordance with the orders of this court."

[fol. 12] VII

Amendment to paragraph 10 by striking therefrom that portion thereof following the word "above", page 3, line 15, and substituting in place thereof, "together with a certified copy of stipulation made in said cause extending time to respondent therein to plead to said bill of complaint, together with a certified copy of an order made by the Chancellor upon such stipulation, together with a certified copy of the motion of the complainant in said cause for a decree pro confesso, together with a certified copy of an order of said Chancellor ordering said bill of complaint to be taken pro confesso and a waiver of notice of the same on behalf of the respondent herein, are annexed hereto and made a part hereof by reference".

VIII

Amendment to the prayer of said complaint by adding thereto the following paragraphs:

"That a subpoena may forthwith issue to respondent, International Re-Insurance Corporation, requiring it to answer this bill of complaint herein upon a date certain, but not under oath, answer under oath being expressly waived".

"That this court take such steps as it deems meet and proper to ascertain the indebtedness of respondent, International Re-Insurance Corporation, to the creditors thereof within the jurisdiction of this court, and that this court fully administer said respondent's property and as-

sets within this jurisdiction and determine the respective rights, liens and priorities of said respondent's said creditors, and after this court shall have taken such steps with respect to respondent's said property and assets as it shall [fol. 13] deem meet and proper in the interests of the creditors within the jurisdiction of this court, that it deliver or cause to be delivered to your petitioners herein the net balance of said property and assets to be remitted to and administered by said Chancery Court of the State of Delaware".

"That complainant may have such other and further relief as to this court may seem necessary and proper".

IX

That said bill heretofore filed herein, together with the above amendments thereto, shall read as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

In Equity. No. Z95C

BERTHA E. MAURER, Complainant,

vs.

INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation, Respondent

Petition for Appointment of Ancillary Receiver

"To the Honorable Judges of the District Court of the United States, for the Southern District of California:

[fol. 14] "The petition of Arthur G. Logan, Carl M. Hansen, and George de Bienzille Keim respectfully shows to this Honorable Court:

"1. That on the 19th day of April, 1933, your petitioners by an order and decree duly made in the Court of Chancery of the State of Delaware in and for New Castle County, were duly appointed receivers of the assets, estate and effects of the above named respondent in an action in said Court of Chancery entitled 'Bertha E. Maurer, complainant, vs. International Re-Insurance Corporation, a corporation created by and existing under the laws of the

State of Delaware, respondent' with authority and power, among other things, to apply for and obtain the appointment of an ancillary receiver or ancillary receivers of the said respondent, International Re-Insurance Corporation, in any jurisdiction or jurisdictions in which said respondent, International Re-Insurance Corporation may have property.

"2. Your petitioners have duly accepted the trust in them reposed and have duly qualified as such receivers and have filed the bond as directed in said order.

"3. Respondent herein, International Re-Insurance Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware and engaged in a general casualty insurance and suretyship business in the County of Los Angeles, State of California, as well as elsewhere in said state and in the United States. That said respondent has an office located in the City of Los Angeles, State of California, and within the jurisdiction of this court.

[fol. 15] "4. That on the 23rd day of March, 1933, a bill of complaint was duly filed in the Court of Chancery of the State of Delaware, in and for New Castle County, against said respondent for the purpose of having a receiver or receivers appointed of all and singular the property and assets of every nature and wheresoever situated of the said respondent.

"5. That the nature of the cause of action is more particularly referred to in the bill of complaint in the aforesaid action, an exemplified copy of which is hereto annexed and made a part hereof by reference.

"6. That simultaneously with the filing of said bill of complaint an application was made for the appointment of a receiver and that your petitioners were duly appointed as such receivers, as set forth in paragraph I hereinabove mentioned.

"7. That the respondent owns and possesses property consisting of land, buildings, securities, moneys in banks, pledges, accounts receivable and other assets, together with furniture and fixtures located in the City of Los Angeles, State of California; that certain creditors of said

respondent have commenced suits and levied attachments on said assets and your petitioners are informed and verily believe that certain creditors are threatening suits against the said property, and that attachments are about to be issued or may be issued against the said property as there are considerable outstanding and past due obligations. In the event suits are brought this respondent will have no valid or legal defense to any of said actions, and if such attachments are issued the creditors of this estate, as well as your petitioners, will sustain irreparable damage and [fol. 16] loss by reason of court costs and the damage incident to such interference with the property of the respondent.

"8. That in the opinion of your petitioners the property, assets and effects of respondent located in Los Angeles are worth in excess of secured and unsecured debts in the neighborhood of about two million dollars.

"9. Your petitioners are of the opinion and verily believe that it is absolutely necessary for the reasons above set forth, for the preservation of the property of the respondent and the protection of the creditors interested herein that this court assist and lend its aid in enforcing the aforesaid decree of the Chancery Court of the State of Delaware by gathering together the assets of said respondent, International Re-Insurance Corporation herein within the jurisdiction of this court, or causing the same to be gathered together, in administering and marshaling the same, taking such steps with respect to the property and assets of said respondent as to this court shall seem meet and proper to protect the interests of the creditors of said respondent in this jurisdiction, and causing the net balance of said property and assets, after such steps as this court may take in the interests of creditors of respondent in this jurisdiction, to be delivered to the court of primary jurisdiction, to-wit, the Chancery Court of the State of Delaware, and for the purpose of protecting and preserving the assets of respondent within the jurisdiction of this court from dissipation and waste until this court makes its final determination on the bill here presented [fol. 17] that ancillary receivers be appointed by this court to take possession of said property and assets and administer the same in accordance with the orders of this court.

"10. That a certified copy of the order appointing your petitioners as such receivers, with a certification as to the due approval of the bond of your petitioners as such receivers, as well as an exemplified copy of the bill of complaint referred to above, together with a certified copy of stipulation made in said cause extending time to respondent therein to plead to said bill of complaint, together with a certified copy of an order made by the Chancellor upon such stipulation, together with a certified copy of the motion of the complainant in said cause for a decree pro confesso, together with a certified copy of an order of said Chancellor ordering said bill of complaint to be taken pro confesso and a waiver of notice of the same on behalf of the respondent herein are annexed hereto and made a part hereof by reference.

"11. That no previous application for such order has heretofore been made.

"Wherefore, your petitioners pray for an order of this court appointing ancillary receivers of all the property, assets and effects of the above named respondent which are situated within this jurisdiction, to care for and preserve the same until the further order of this court, and for an order of this court directing the agents and employees and all other persons, including creditors, to deliver [fol. 18] into the possession of the ancillary receiver so appointed all the property of the said respondent which is not exempt by law, and otherwise to comply with the terms of the said order, and that the respondent, its agents, servants and employees and all persons be restrained and enjoined from in any way interfering with the possession of the said property other than to turn the same over to the said ancillary receivers.

"That a subpoena may forthwith issue to respondent, International Re-Insurance Corporation, requiring it to answer this bill of complaint herein upon a date certain, but not under oath, answer under oath being expressly waived.

"That this court take such steps as it deems meet and proper to ascertain the indebtedness of respondent, International Re-Insurance Corporation, to the creditors thereof within the jurisdiction of this court, and that this court fully administer said respondent's property and assets within this jurisdiction and determine the respective

rights, liens and priorities of said respondent's said creditors, and after this court shall have taken such steps with respect to respondent's said property and assets as it shall deem meet and proper in the interests of the creditors within the jurisdiction of this court, that it deliver or cause to be delivered to your petitioners herein the net balance of said property and assets to be remitted to and administered by said Chancery Court of the State of Delaware.

[fol. 19] "That complainant may have such other and further relief as to this court may seem necessary and proper.

"Dated April 18, 1933.

Newlin & Ashburn, C. J. Harrison, Attorneys for Petitioners."

Duly sworn to by C. J. Harrison. Jurat omitted in printing.

[fol. 20] IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BERTHA E. MAURER, Complainant,

vs.

THE INTERNATIONAL RE-INSURANCE COMPANY, a Corporation Created by and Existing under the Laws of the State of Delaware, Respondent

BILL FOR APPOINTMENT OF RECEIVER

To the Chancellor of the State of Delaware:

Humbly complaining, Bertha E. Mauer, of the City of Elizabeth, State of New Jersey, on behalf of herself and all other creditors of the said The International Re-Insurance Company, who shall come in and contribute to the expense of this suit, showeth unto your Honor as follows:

1. That the said The International Re-Insurance Company is a corporation created by and existing under the laws of the State of Delaware and is engaged in the business of insuring and re-insuring persons and property and issuing policies of insurance and re-insurance to divers persons, firms and corporations for stated premiums. That

[fol. 21] said The International Re-Insurance Company is not a corporation for public improvement.

2. That the complainant recovered a judgment against Fred Sauderoff in the Union County Common Pleas Court of the State of New Jersey on January 26, 1933, in the amount of $20,000.

3. That the Commonwealth Casualty Company, a corporation of the State of Pennsylvania, engaged in the general casualty insurance business, issued a casualty insurance policy in favor of Fred Sauderoff agreeing to indemnify him against loss to the extent of $5,000. Under the laws of the State of New Jersey and the terms of said policy the said Commonwealth Casualty Company became indebted to the complainant in the sum of $5,000.

4. That on or about September 16, 1931, the said Commonwealth Casualty Company and Independence Indemnity Company, a corporation organized under the laws of the State of Pennsylvania, merged into a new company known as "Independence Indemnity Company". By reason of the said merger the Independence Indemnity Company assumed all of the liabilities and acquired all of the assets of the Commonwealth Casualty Company.

5. That subsequent thereto The International Re-Insurance Company the above named respondent, was organized under the laws of the State of Delaware.

6. That on or about October 31, 1932, a merger agreement was entered into between the respondent and the Independence Indemnity Company. The said agreement provided, among other things that "The International Re-Insurance Company agrees to assume and pay, satisfy and discharge as they may become due each and all of the [fol. 22] liabilities of the Independence Indemnity Company on the effective date of the transfer herein provided for and to assume, satisfy and discharge any and all contingent liabilities which may after the effective date of said transfer become due from or established against the Independence Indemnity Company."

7. That under the terms of the said merger agreement the Independence Indemnity Company transferred all of its assets to the respondent. In effect, the respondent ac-

quired all of the assets of the Independence Indemnity Company and assumed all of its liabilities.

8. That by reason of the said merger the respondent is indebted to the complainant in the sum of $5,000.

9. That on March 22, 1933, a judgment was obtained in the Essex County Circuit Court against Independence Indemnity Company in the amount of $1,007.50.

10. That the Independence Indemnity Company issued a draft in the matter of Abraham Silverstein, by his next friend, Anna Silverstein, v. Hyman C. Schreider, et al., which has been returned for insufficient funds. Other checks and drafts have been issued and returned for the same reason.

11. That Rudolph Oppenheimer, who is the claim agent for the respondent company, in charge of the office located at Newark, New Jersey, stated that he was unable to obtain from the company funds for any of the claimants.

[fol. 23] 12. That your orator is informed and believes and therefore avers that there are divers other suits, judgments and claims against said respondent corporation and that said respondent corporation does not have funds or property available with which to pay said obligations.

13. That the said respondent corporation is now possessed of certain property, rights and credits, but that said corporation is insolvent in that it is unable to meet its current and maturing obligations as they fall due.

14. That certain of the respondent's creditors heretofore referred to in Paragraph 12 of this bill of complaint are pressing for immediate payment of their respective claims and are likely to attach the property of the said respondent corporation and to cause its property to be sold in satisfaction of judgments recovered or about to be recovered.

15. Should the respondent's property be sold piecemeal by separate sales made to satisfy separate judgments recovered against it, the amount realized would be only a small proportion of the fair value of the property of the respondent, and would be insufficient to pay the respondent's indebtedness, so that unless the property and assets of said respondent are preserved and protected through a

receiver appointed by this Honorable Court, the same will be dissipated and wasted to the great detriment of your complainant and all of the other creditors of said respondent corporation.

[fol. 24] Wherefore, your orator being without remedy in the premises, except in this Court of Chancery, prays as follows:

1. That a subpœna may forthwith issue to said respondent corporation requiring it to answer this bill of complaint upon a day certain, but not under oath, answer under oath being hereby expressly waived.

2. That the indebtedness of the respondent corporation to the complainant and to all other creditors be ascertained and that the Court fully administer the respondent's property and assets and determine their respective rights, liens and priorities of the respondent's creditors.

3. That your Honor may appoint one or more persons to be receiver or receivers of said respondent corporation to take charge of the estate, effects, business and affairs of said corporation wherever situated, and to collect the outstanding debts, claims and property due or belonging to said corporation with power to prosecute and defend, in the name of the corporation or otherwise, claims or suits, and to appoint an agent or agents under such receiver or receivers, and generally with power to do all other acts which may be done by such corporation as may be necessary and proper under the order and decree of this Court.

4. That a receiver pendente lite be forthwith appointed for said respondent corporation to take charge of the estate, effects, business and affairs of said corporation within the State of Delaware, and to take such action as such receiver can take to protect the assets of said respondent corporation.

[fol. 25] 5. That the respondent, its officers, agents and employees and all other persons claiming or acting by, through or under it, be enjoined and restrained from interfering with the said receiver in taking possession of and managing the property of said respondent corporation.

6. That the complainant may have such other and further relief as to the Court may seem necessary.

Bertha E. Maurer, Complainant. John Biggs. Jr., Solicitors.

Duly sworn to by Bertha E. Maurer. Jurat omitted in printing.

[fol. 26] IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BERTHA E. MAURER, Complainant,

vs.

THE INTERNATIONAL RE-INSURANCE COMPANY, a Corporation Created by and Existing under the Laws of the State of Delaware, Respondent

STIPULATION AMENDING NAME, ETC.

And now, to-wit, this 12th day of April, 1933, it is stipulated and agreed by and between John Biggs, Jr., Esquire, solicitor for Bertha E. Maurer, the complainant herein, and Ayres J. Stockly, Esquire, solicitor for International Re-Insurance Corporation, inadvertently referred to as The International Re-Insurance Company in the foregoing cause, that the said Bill of Complaint, all writs, summonses and other processes in the said cause be amended by changing the words "The International Re-Insurance Company" to "International Re-Insurance Corporation", and it is further

Stipulated and agreed by and between the said solicitors for the complainant, said Bertha E. Maurer, and the respondent, said International Re-Insurance Corporation, that [fol. 27] the time for filing plea, answer or demurrer to the Bill of Complaint be and the same hereby is extended until April 17, A. D. 1933.

John Biggs, Jr., Solicitor for Complainant. Ayres J. Stockly, Solicitor for Respondent.

And now, to-wit, this 12th day of April, 1933, the foregoing Stipulation of John Biggs, Jr., Esquire, solicitor for Bertha E. Maurer, the complainant herein, and Ayres J.

Stockly, Esquire, solicitor for International Re-Insurance Corporation, inadvertently referred to as The International Re-Insurance Company, the respondent herein, having been read and maturely considered by the Chancellor, now, upon motion of John Biggs, Jr., Esquire, solicitor for the complainant,

It is ordered by the Chancellor that the said Bill of Complaint, all writs, summonses and other processes in the foregoing cause be and the same hereby are amended by striking out the phrase "The International Re-Insurance Company" wherever the same appears and substituting in lieu thereof the words "International Re-Insurance Corporation".

And it is further ordered by the Chancellor that the time for pleading, answering or demurring to the Bill of Complaint heretofore filed in this cause be and the same is hereby extended until the Seventeenth day of April, A. D. 1933.

(S.) J. O. Wolcott, Chancellor.

[fol. 28] IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BERTHA E. MAURER, Complainant,

vs.

INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation Created by and Existing under the Laws of the State of Delaware, Respondent

MOTION THAT BILL BE TAKEN PRO CONFESSO

On this Eighteenth day of April, A. D. 1933, comes the above named complainant, by John Biggs, Jr., Esquire, her solicitor, and moves the Court that the Bill of Complaint filed in the above cause be taken pro confesso as to said defendant for failure to file there an answer, plea or demurrer to said bill of complaint within the time fixed therefor by the order of the Chancellor entered in said cause on the Twelfth day of April, A. D. 1933.

(S.) John Biggs, Jr., Solicitor for Complainant.

[fol. 29] IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BERTHA E. MAURER, Complainant,

vs.

INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation Created by and Existing under the Laws of the State of Delaware, Respondent

ORDER TAKING BILL PRO CONFESSO, ETC.

On this eighteenth day of April, A. D. 1933, it appearing that International Re-Insurance Corporation, the defendant, has not filed answer, demurrer or plea in this cause according to the Rule of Court in that behalf, therefore upon motion of John Biggs, Jr., Esq., solicitor for the complainant,

It is ordered by the Cancellor that the bill of complaint filed in this cause be taken pro confesso as to the said International Re-Insurance Corporation.

And it is further ordered by the Chancellor, Ayres J. Stockly, Esquire, solicitor for the defendant consenting thereto, that said cause be, and it is hereby, set down for hearing on the bill of complaint taken pro confesso before [fol. 30] the Chancellor, at his Chambers in the County Court House, in the City of Wilmington, on Wednesday, the Nineteenth day of April, A. D. 1933 at 10:30 o'clock in the forenoon, and the Register in Chancery is hereby directed to give notice of said hearing to the solicitor of record for said defendant.

J. O. Wolcott, Chancellor.

Issuance and service of notice above required is hereby waived.

Ayres J. Stockly, Solicitor for Defendant.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BERTHA E. MAURER, Complainant,

vs.

INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation Created by and Existing under the Laws of the State of Delaware, Respondent

ORDER APPOINTING RECEIVERS, ETC.

And now, to-wit, this 19th day of April, A. D. 1933, the above entitled cause coming before the Chancellor on mo- [fol. 31] tion of John Biggs, Jr., Esq., solicitor for the complainant, for a decree upon the bill of complaint taken pro confesso;

And it appearing from the said bill and from the testimony heard by the Chancellor that the respondent corporation, International Re-Insurance Corporation, is a corporation of the State of Delaware; that it is not a corporation for public improvement; that it is insolvent in that it is unable to meet its obligations as they mature in the usual and regular course of business; that Bertha E. Maurer, the complainant, is a creditor of the said respondent corporation; that the complainant is entitled to the relief prayed; that the complainant has no adequate remedy save through the granting of this decree; that it is necessary for the protection and preservation of the respective rights and equities of all persons who have dealt with or are interested in the respondent, that the property and business of the respondent be preserved and administered in this Court through a Receiver or Receivers appointed by the Chancellor and it is necessary that a Receiver or Receivers of the respondent and of its property should be appointed forthwith with the powers herein granted; upon motion of John Biggs, Jr., Solicitor for complainant, it is

Ordered, adjudged and decreed by the Chancellor that

1. Arthur G. Logan of the City of Wilmington, State of Delaware, Carl M. Hansen of the City of Philadelphia, State of Pennsylvania and George deB. Keim of the City of Edgewater Park, State of New Jersey, be and they

hereby are appointed receivers of and for International [fol. 32] Re-Insurance Corporation, with power to take charge of the estate, effects, business and affairs of the said corporation and to collect the outstanding debts, claims and property due and belonging to it; with power to prosecute and defend, in the name of the corporation, or otherwise, all claims or suits; to apply for and obtain the appointment of an ancillary receiver or ancillary receivers of the said corporation in any jurisdiction or jurisdictions in which the said corporation may have property; to appoint an agent or agents under them, and to do all other acts which might be done by such corporation and as may be necessary and proper for the preservation of its estate, effects, business and affairs, and, insofar as it may be necessary in their judgment, to continue the business of the said corporation for the purpose of conserving the estate until the further order of this Court.

2. That the said respondent corporation, International Re-Insurance Corporation, its officers, directors, servants, attorneys, agents and employees, be and they hereby are ordered and directed to deliver into the possession and control of the said receivers all of the property, assets, books, papers, records and documents of the said respondent corporation now in its, their or any of their possession or control.

3. That the said respondent corporation, International Re-Insurance Corporation, its officers, directors, servants, agents, attorneys and employees, be and they hereby are restrained and enjoined from selling, assigning, secreting, transferring, encumbering, or otherwise disposing of any of the assets of the said respondent corporation, wherever [fol. 33] the same may be, or from taking possession of or attempting to seize by judicial process or otherwise or attempting to sell or dispose of any of the assets and property, including the books, records and documents of the said respondent corporation, and from in any manner interfering with the said receivers in the discharge of their duties hereunder, or in their possession, of any of the estate, effects, assets, books, records or documents of the said corporation.

4. That the creditors of the respondent corporation and all other persons, associations and corporations are hereby

enjoined and restrained from removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of or in any way interfere with any property, assets, or effects in the possession of the respondent, or of the Receivers, or owned by the respondent and in its possession, or in the possession of any of its officers, agents or employees; and from doing any act or thing whatsoever to interefere with the possession and management by the Receivers of the property and assets of the respondent or in any way to interfere with the Receivers in the discharge of their duties or to interfere in any manner with the administration and disposition in this suit of the property and affairs of the respondent, and the respondent and its officers, agents and employees and all persons claiming and acting by, through and under it or them or any of them are hereby restrained from receiving, acquiring, selling, disposing of or in any way encumbering or handling any or all of the property and assets of the respondent.

5. That the said receivers be and they hereby are, authorized in their discretion to employ such agents, em- [fol. 34] ployees, servants, accountants, attorneys or counsel as may in their judgment be advisable or necessary in the management, control or custody of the respondent and its affairs and of the assets thereof, and in the furtherance or protection of its interests and in the process of winding it up, and that said Receivers be, and they hereby are, authorized to incur such expense and to make such payments and disbursements as may be needful or proper for the preservation of the properties of the respondent.

6. That the said receivers be, and they hereby are, authorized to consider and determine which of the contracts, policies, undertakings, agreements, leases or other contractual arrangements between the respondent and any other persons and corporations they will renounce or adopt and to adopt and perform such of said contracts, policies, undertakings, agreements, leases or other contractual arrangements of the respondent as they may deem desirable or necessary in furtherance of the interests of the Receivership estate to adopt and perform, provided, however, that pending the further order of the Chancellor none of said Receivers' acts or omissions in the performance or failure to perform any of such contracts, policies, undertakings

agreements, leases or other contractual obligations shall constitute or be considered an election to adopt or an estoppel to renounce any of them.

7. That said receivers be and they hereby are, authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become party to such suits, actions, proceedings at law or in equity, including ancillary proceedings, in state or federal courts, as may in [fol. 35] their judgment be necessary or proper for the protection, maintenance and preservation of the property and assets of the respondent or the carrying out of the terms of this decree, and likewise to defend, compromise or adjust or otherwise dispose of any and all suits, actions or proceedings instituted against them as receivers or against the respondent and also to appear in and conduct the prosecution or defense of any suit or appeal from any judgment or adjust or compromise any actions or proceedings now pending in any court by or against the respondent where such prosecution, appeal, defense or other disposition of such suits, actions, judgments or proceeedings will, in the discretion of the Receivers, be advisable or proper for the protection of the properties of the respondent.

8. That the said Receivers be and they are hereby directed to open proper books of account wherein shall be stated the expenses, receipts and disbursements of their trust; to take and preserve vouchers for all payments made; to deposit all moneys coming into their hands in some National Bank or Trust Company in the State of Delaware and to report to the Chancellor the name of the depository selected for that purpose.

9. That the said Receivers, or any party to this cause, may at any time, upon proper notice, apply to the Chancellor for any further or other instructions or powers necessary to enable the said Receivers properly to perform their duties as Receivers.

10. That the Chancellor reserves the right to make such further orders or decrees, or amendments or modifications of this decree, as may hereafter seem appropriate and proper.

[fol. 36] 11. That said Receivers herein appointed shall give bond in the usual form in the penal sum of Ten Thou-

sand Dollars and United States Fidelity and Guaranty Company, a corporation of the State of Maryland, is hereby approved as surety on said bond.

(S.) J. O. Wolcott, Chancellor.

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,
New Castle County, ss:

I, George R. McDougall, Register of the Court of Chancery of the State of Delaware, in and for New Castle County, do hereby certify that the foregoing is a true and correct copy of Bill of Complaint, Stipulation and Order, dated the Twelfth day of April, A. D. 1933, the Motion and Order dated the Eighteenth day of April, A. D. 1933, and the Order Appointing Receivers signed by the Chancellor on the Nineteenth day of April, A. D. 1933, in the cause of Bertha E. Maurer vs. International Re-Insurance Corporation, as the same remain on file and of record in said Court.

And further certify That said Receivers have duly qualified by filing the bond required by said decree.

[fol. 37] In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Wilmington, this Twentieth day of April, A. D. 1933.

Geo. R. McDougall, Register in Chancery. Newlin & Ashburn, C. J. Harrison, Attorneys for Petitioners. (Seal.)

Upon application of the above named petitioners, and good cause appearing therefor, leave is hereby granted to them to file the amendments hereinabove set out to their bill of complaint heretofore filed herein.

Dated April 25, 1933.

Wm. P. James, Judge.

Duly sworn to by C. J. Harrison. Jurat omitted in printing.

[fol. 38] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER OF RESPONDENT INTERNATIONAL RE-INSURANCE CORPORATION—Filed April 25, 1933

International Re-Insurance Corporation, respondent, to the bill of complaint of petitioners Arthur G. Logan, Carl M. Hansen and George de Bienzille Keim, for answer to said bill of complaint and the amendments thereto heretofore filed herein, or so much thereof as respondent is advised that it is necessary or material for respondent to answer, says:

I

That respondent, International Re-Insurance Corporation, admits each and all of the allegations in said bill of complaint and said amendments thereto contained.

[fol. 39] II

Said respondent reiterating the admissions of the preceding paragraph of this answer prays that this court sitting in equity take possession of the property and assets of respondent in this jurisdiction through the appointment of an ancillary receiver or ancillary receivers, as prayed for in said bill of complaint, with the powers and authority so prayed for; that this court issue such orders and make such decrees and adjudicate such matters as may be necessary or advisable in aid of said suit and in accordance with the rights, interests and equities of all persons ascertained and determined to have an interest therein.

III

This answer, with the foregoing admissions, is made pursuant to resolution of the executive committee of the Board of Directors of respondent corporation, which was duly adopted by said executive committee on the 18th day of April, 1933, and authorized the interposition of this answer with its consent to the appointment of an ancillary receiver or ancillary receivers herein.

International Reinsurance Corporation, by Emil Johnson, Vice-President. Brown, Bissell & Beery, Solicitor for Respondent.

[File endorsement omitted.]

[fol. 40] In United States District Court, Southern District of California, Central Division

[Title omitted]

Order Amending Order Appointing Ancillary Receivers —Filed May 3, 1933

The attention of this court having been directed to the fact that the order heretofore made by this court appointing ancillary receivers of respondent, International Re-Insurance Corporation, erroneously described said International Reinsurance Corporation as a corporation organized and existing under and by virtue of the laws of the State of California, whereas in truth and in fact and as alleged in the bill praying for the appointment of said ancillary receivers, said respondent corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and it further appearing that said mis-description of said corporation was caused through inadvertence and clerical misprision in preparing said order,

It is hereby ordered that said order appointing said ancillary receivers may be and hereby is amended *nunc pro tunc as* of the date of said order to describe said respondent, [fol. 41] International Re-Insurance Corporation as a corporation organized and existing under and by virtue of the laws of the State of Delaware, instead of a corporation organized and existing under and by virtue of the laws of the State of California.

Dated May 3, 1933. Geo. Cosgrave, Judge.

[File endorsement omitted.]

In United States District Court

Motion to Vacate Order Appointing Receivers, to Dissolve Restraining Order, to Dismiss Petition for Appointment of Receivers, and to Re-examine the Ex Parte Order Appointing the Receivers—Filed May 2, 1933.

To the Honorable Court above-entitled, and to the Clerk thereof, and to the Petitioners in the above-entitled proceeding and their attorneys, Messrs. Newlin and Ashborn and C. J. Harrison, Esq.:

You and each of you will hereby please take notice that on the 8th day of May, 1933, at the hour of ten o'clock

[fol. 42] A. M. of said day, in the courtroom of the above-entitled court, Room 422, in the Federal Building in the City of Los Angeles, California, E. Forrest Mitchell, as Insurance Commissioner of the State of California, will move said court

(1) to vacate the order made herein on April 20, 1933, appointing George de Beinzille Keim and W. H. Comstock ancillary receivers of the above-named respondent,

(2) to dissolve the restraining order embraced within said order of April 20, 1933,

(3) to dismiss the petition filed herein for the appointment of ancillary receivers, and

(4) to re-examine the said order, which was ex parte, appointing said ancillary receivers.

Said motion will be made and based upon all of the records on file herein, upon this notice of motion, upon the points and authorities served and filed herewith, upon the affidavit of Bernon Mitchell served and filed herewith as part of said motion, and upon the following grounds:

I

That said petition for the appointment of ancillary receivers does not state facts sufficient to give the above-entitled court jurisdiction of the subject matter of, or of the parties to, the above-entitled proceeding, or jurisdiction to appoint ancillary receivers of the above-named respondent.

II

That said petition is wanting in equity and therefore does not justify the said appointment of ancillary receivers.

[fol. 43] III

That the said order of appointment is not a valid order by reason of the said insufficiency of said petition.

IV

That the said order of appointment is not a valid order by reason of the fact that it refers to a corporation other than the respondent named in said petition.

V

That W. H. Comstock is not qualified as an ancillary receiver of the above-named respondent for the reasons that the said petition is insufficient and the said order of appointment is invalid, as aforesaid; that his bond refers to a corporation other than the respondent named in said petition; that his bond runs to him only and not to his co-receiver; that his bond does not meet the requirements of Rule 28 of the above-entitled court; and that the oath of office as receiver has been taken and filed by W. H. Comstock only.

VI

That the aforesaid restraining order is not a valid order in that it does not meet the requirements of Rule 73 of the Rules of Practice for the Courts of Equity of the United States.

VII

That a petition by E. Forrest Mitchell, as Insurance Commissioner of California, for the liquidation of the above-named respondent and for the appointment of said Commissioner as liquidator, with powers and duties of an ancillary receiver, was filed in the Superior Court of the State of California in and for the County of Los Angeles on April 19, 1933; that on the same day said court [fol. 44] issued a temporary restraining order against the above-named respondent enjoining it from transacting business or disposing of its property in California and ordering said Commissioner into the actual possession of said property; that said Commissioner took actual possession of said property in the morning of April 20, 1933, at which time said restraining order was served upon the above-named respondent; and that, therefore, the State of California, acting by and through its said court and its said Commissioner, acquired jurisdiction of the business and property of the above-named respondent in said State before any jurisdiction thereof was acquired by the above-entitled court in the above-entitled proceeding.

VIII

That long prior to the filing of the said petition herein, at the time of said filing, and ever since, the State of California, acting by and through its said Insurance Commis-

sioner, has had control and jurisdiction of the business and affairs of the above-named respondent in said State; that prior to the filing of this proceeding said Commissioner had suspended the certificate of authority of the above-named respondent, theretofore issued by said Commissioner, to transact the business of workmen's compensation insurance in California, and that such suspension has ever since continued in effect; and that, therefore, the State of California, acting by and through its said Commissioner, acquired jurisdiction of the business and property of the above-named respondent in said State before any juris- [fol. 45] diction thereof was acquired by the above-entitled court in the above-entitled proceeding.

IX

That the restraining order issued in the above-entitled proceeding was made on April 20, 1933, and was not served on said Commissioner until the afternoon of April 21, 1933, at which time said Commissioner was in actual possession of the business and property of the above-named respondent in the State of California.

X

That no proof was made to the above-entitled court of the allegations of the petition filed herein prior to the making of the said order appointing ancillary receivers herein, and the making of said order was purely ex parte.

Dated May 1, 1933.

E. Forrest Mitchell, as Insurance Commissioner of the State of California. Frank L. Guerena, Attorney for said Commissioner. Frank L. Guerena, 1420 Mills Tower, San Francisco.

Received copy May 2, 1933. Newlin & Ashburn, C. J. Harrison, attorneys for plaintiff.

[File endorsement omitted.]

[fol. 46] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF EMIL JOHNSON IN OPPOSITION TO MOTION OF E. FORREST MITCHELL AS INSURANCE COMMISSIONER OF CALIFORNIA—Filed May 8, 1933

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Emil Johnson, being first duly sworn, deposes and says: That he is and at all times herein mentioned has been an officer, to-wit, Vice President of International Re-Insurance Corporation, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having an office in the City and County of Los Angeles, State of California.

That on or about March 30th, 1933, E. Forrest Mitchell, Insurance Commissioner of the State of California, suspended the certificate of authority or license of said International Re-Insurance Corporation to transact in California the business of workmen's compensation insurance; that prior thereto International Re-Insurance Corporation, in compliance with the law of the State of California, had duly filed with said State Insurance Commissioner a bond of Union Indemnity Company for the beneficiary or of awards of compensation rendered by the Industrial Accident Commission; that thereafter said Union Indemnity Company became insolvent; that thereafter said International Re-Insurance Corporation filed a new bond of General Indemnity Company in lieu of the aforesaid bond of Union Indemnity Company; that said latter bond was rejected as unsatisfactory by said State Insurance Commissioner, and upon the failure of International Re-Insur-
[fol. 47] ance Corporation to substitute a satisfactory bond therefor its license to transact in California the business of workmen's compensation insurance was revoked; that no further steps were taken by said State Insurance Commissioner with respect to the property or assets of International Re-Insurance Corporation and no possession or demand for possession of the same were ever made by said State Insurance Commissioner.

That during the morning on April 20th, 1933, your affiant was served with a copy of the petition referred to in the affidavit of Bernon F. Mitchell and also with a copy of the

order to show cause referred to in said affidavit; that at that time no demand was made on behalf of said Insurance Commissioner for possession of the property or assets of respondent International Re-Insurance Corporation; that thereafter your affiant went to the offices of Messrs. Newlin & Ashburn, attorneys at law, whom he was informed were acting as attorneys for receivers appointed in Delaware on April 19th, 1933, for International Re-Insurance Corporation; that his purpose in going there was to request advice with respect to said petition and said order to show cause; that while at said office he was informed by Mr. Guerney E. Newlin that the above entitled court had appointed its ancillary receivers for said corporation, and he was introduced to W. H. Comstock, one of said ancillary receivers. While in said offices he was served by said W. H. Comstock with a copy of the order of the above entitled court appointing said ancillary receivers and was informed by said W. H. Comstock that such service was to be regarded by your affiant as a demand for and acquisition of the property and assets of said International Re-Insurance Corporation, [fol. 48] and that until further orders your affiant was to regard and conduct himself as an agent and employee of said ancillary receivers.

That thereafter your affiant returned to the offices of International Re-Insurance Corporation arriving there at or a little after two o'clock P. M.; that he found there awaiting him two deputies from the office of the Insurance Commissioner to whom he exhibited the order of this court appointing ancillary receivers which had theretofore been served upon him; that thereupon said deputies served upon your affiant the "Order to Seize and take Possession", a copy of which is set forth in the affidavit of said Bernon F. Mitchell.

That during the afternoon of April 21st, 1933, two deputies from the office of the State Insurance Commissioner came to the office of International Re-insurance Corporation and announced that they had been instructed to remain in said office until they were served with a certified copy of the order of this court appointing ancillary receivers; that your affiant immediately delivered them a certified copy of said order whereupon they left.

That since the service of the order of this court appointing ancillary receivers upon your affiant, as described

above, said W. H. Comstock has been continuously and actively in charge of the business and affairs of said International Re-Insurance Corporation.

Emil Johnson.

Subscribed and sworn to before me this 6th day of May, 1933. Effie D. Botts, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[fol. 49] [Endorsed]: Received copy of the within affidavit this 8th day of May 1933. Frank L. Guerena, Attorney for E. Forrest Mitchell, Insurance Commissioner of California.

[File endorsement omitted.]

In United States District Court

Present: The Honorable Geo. Cosgrave, District Judge.

No. Z-95-C-Eq.

Bertha E. Mauer, Plaintiff,

vs.

International Re-insurance Corporation, Respondent

Order Denying Motion to Vacate—May 12, 1933

The Court having heard argument of counsel under date of May 8th, 1933, on Motion of E. Forrest Mitchell as Insurance Commissioner of State of California, to vacate Order of April 20th, 1933, appointing George De Beinzille Keim and W. H. Comstock, Ancillary Receivers of the respondent, to dissolve Restraining Order to Dismiss Petition for appointment of Ancillary Receivers, and to re-examine said Order appointing Ancillary Receivers, pursuant to Motion filed May 2nd, 1933, and thereafter ordered stand [fol. 50] submitted, and Memorandum of Points and Authorities in opposition to said Motion having, on said date, been filed, and under date of May 10th, 1933, Memo of Law having been filed by the defendants, and after due con-

sideration and being now fully advised, the Court files its order; and, pursuant thereto, said Motion of the Insurance Commissioner is denied.

IN UNITED STATES DISTRICT COURT

MEMORANDUM—Filed May 12, 1933

COSGRAVE, District Judge:

It was admitted at the hearing of this motion that the situation presented is within the California statute providing for proceedings against delinquent insurance companies, (Stats. 1919, p. 265) and justifies action by the Insurance Commissioner; that a proceeding under the act referred to was filed in the state court after the filing of the bill in this court; that the assets of the delinquent company were in the possession of the Insurance Commissioner at the time of the appointment and qualification of the receiver appointed by the district court and that possession was yielded by the former to the latter.

While the bill in this court is lacking in many details, in its general scope it is sufficient as for a proceeding ancillary to that in the Delaware court, (Cyc. Fed. Proc. 3346), and having been first filed in this court jurisdiction of the res is in the district court. (Harkin v. Brundage, 276 U. S. 36, (43)).

Ordinarily where the procedure provided by the laws of the state is sufficient for the purpose it should be followed. [fol. 51] Nevertheless the company being in receivership in the state of its residence and principal place of business, it seems advisable that the liquidation here be in aid and co-operatoin of the court of primary jurisdiction. This inclines me to recognize the action taken in that court and to deny the motion of the Insurance Commissioner.

The Motion of the Insurance Commissioner is denied.

May 12, 1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION FOR RE-HEARING OF ORDER DENYING MOTION OF E. FORREST MITCHELL, INSURANCE COMMISSIONER, STATE OF CALIFORNIA, TO VACATE ORDER APPOINTING RECEIVERS, TO DISSOLVE RESTRAINING ORDER, TO DISMISS PETITION FOR APPOINTMENT OF RECEIVERS, AND TO RE-EXAMINE EX PARTE ORDER APPOINTING RECEIVERS—Filed May 26, 1933

To the Honorable Court, above entitled, and to the Clerk thereof, and to the Petitioners in the above entitled proceedings and their attorneys, Messrs. Newlin & Ashburn and C. J. Harrison, Esq.:

You and each of you, will hereby please take notice that, on the 29th day of May, 1933, at the hour of two o'clock P. M. of said day, in the Court Room of the above entitled court, Room Number 422, in the Federal Building in the [fol. 52] City of Los Angeles, California, E. Forrest Mitchell, as Insurance Commissioner of the State of California, will move said Court to grant a re-hearing of the Order or Decree denying the motion of E. Forrest Mitchell, heretofore filed herein and heard on the 8th day of May, 1933, to vacate the order appointing receivers, to dissolve restraining order, to dismiss petition for appointment of receivers, and to re-examine the ex parte order appointing the receivers.

Said motion will be made and based upon all of the records on file herein, upon this notice of motion, upon the points and authorities served and filed herein and the points and authorities heretofore served and filed herein in support of the motion of this petitioner heard on the 8th day of May, 1933, upon the affidavits of J. L. Maritzen and John L. Flynn, served and filed herewith as a part of said motion, and upon the grounds heretofore set forth in the motion of E. Forrest Mitchell, Insurance Commissioner of the State of California, filed herein and heard on the 8th day of May, 1933, and upon the following additional grounds, to wit:

1. Newly discovered evidence, material to petitioner's motion heretofore filed herein and heard on the 8th day of May, 1933, which petitioner could not with reasonable diligence have produced at the said hearing;

2. Insufficiency of the facts as presented in the affidavits heretofore filed herein to justify the decision, order or decree;

[fol. 53] 3. That the decision, order or decree is against the law or equity.

Dated May 24, 1933.

E. Forrest Mitchell, Insurance Commissioner of the State of California, by H. J. Risbrough, Deputy. Frank L. Guerena, by John L. Flynn, Attorney for Said Commissioner.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT ON MOTION FOR REHEARING

STATE OF CALIFORNIA,
County of Los Angeles, ss:

J. L. Maritzen, a Special Deputy Insurance Commissioner of the State of California, being first duly sworn on oath deposes and says:

[fol. 54] That shortly prior to three o'clock on the afternoon of April 19, 1933, Bernon F. Mitchell, Deputy Insurance Commissioner of the State of California, telephoned from the office of the Liquidation Department of the Division of Insurance in the southern portion of the State of California to Emil Johnson, Vice-President of the International Re-Insurance Corporation, a corporation, respondent herein, and stated to said Emil Johnson that he, Bernon F. Mitchell, had received word that day that a receiver had been appointed for International Re-Insurance Corporation in the State of Delaware and that he, Bernon F. Mitchell, was coming over to the office of said Emil Johnson and International Re-Insurance Corporation, a corporation, respondent herein, for the purpose of discussing with said Emil Johnson the situation as it existed at that time and, at the hour of 3:00 P. M. on April 19, 1933, said Bernon F. Mitchell and John L. Flynn left the office of said Liquidation Department of the Division of Insurance in the

southern portion of the State of California for the purpose of interviewing said Emil Johnson, Vice President of said International Re-Insurance Corporation;

That subsequently thereto, and at or about the hour of 4:15 P. M. of April 19, 1933, said Bernon F. Mitchell and John L. Flynn returned to the office of the Liquidation Department in southern California of the Division of Insurance of the State of California and stated that they had been unable to see said Emil Johnson, Vice President of said respondent corporation, and were advised that said Emil Johnson was then in conference with the counsel of said International Re-Insurance Corporation, a corporation, respondent herein; that said Bernon F. Mitchell and [fol. 55] John L. Flynn then proceeded to the office of the Clerk of the Superior Court of the State of California in and for the County of Los Angeles, taking with them the petition, points and authorities, order to show cause and necessary copies of the action entitled E. Forrest Mitchell, as Insurance Commissioner of the State of California, Petitioner, versus International Re-Insurance Corporation, a corporation, Respondent, and subsequently numbered 356069 in said Superior Court;

That at about the hour of 9:30 o'clock A. M. on April 20, 1933, your affiant and Bernon F. Mitchell went to the office of the International Re-Insurance Corporation, a corporation, respondent herein, at which time said order to show cause and restraining order, a copy of which is attached hereto, marked Exhibit A and made a part hereof, together with a copy of said petition, was duly served on said Emil Johnson as Vice President of said respondent corporation; that thereafter and in pursuance of said order to show cause and restraining order issued by said Superior Court of the State of California in and for the County of Los Angeles in Cause No. 356069 and, to wit: at about the hour of 10:30 A. M. on the 20th day of April, 1933, your affiant and Bernon F. Mitchell returned to the office of the Division of Insurance in the State Building for the purpose of having drawn and signed seizure notices and then returned to the office of the International Re-Insurance Corporation, respondent herein, at about 11:55 o'clock A. M. on April 20, 1933; that the said Emil Johnson, Vice President of the International Re-Insurance Corporation, was not in the said office and affiant and

Bernon F. Mitchell awaited his return, which was about 12:20 o'clock P. M. April 20, 1933; that upon the return [fol. 56] of said Emil Johnson, Vice President of International Re-Insurance Corporation, he, Emil Johnson, exhibited to your affiant and Bernon F. Mitchell a certified copy of the Order of the above entitled Court appointing W. H. Comstock as co-ancillary receiver;

That the Insurance Commissioner is now and at all times subsequent to the 20th day of April, 1933, has been in possession of the books, records and assets of said respondent corporation located in the City and County of San Francisco, California, and holds the same pursuant to the authority vested in him by law and the Order of the Superior Court of the State of California in and for the County of Los Angeles.

That the home office and place where the principal business of respondent corporation is transacted is located at the Pacific Finance Building, 621 South Hope Street, Los Angeles, California; that said respondent corporation owns said Pacific Finance Building and the same is one of the assets of said respondent corporation now in the possession of the receiver heretofore appointed by this court; that the financial statement of respondent corporation filed with the Division of Insurance of the State of California, showing its condition as of December 31, 1932, indicates that said respondent corporation has assets amounting to a total of $25,302,333.23; that the said financial statement also indicates that during the year 1932 the net premiums of the business written amounted to the sum of $10,757,933.61; that the tax report of respondent corporation filed with the Division of Insurance of the State of California as required by the laws of the State of California shows that $2,951,237.87 of the premiums on busi- [fol. 57] ness during the year 1932 were on business written in the State of California; that your affiant is informed and believes that there are now pending in the State of California approximately 3800 claims, suits and/or actions against the respondent corporation; that the International Re-Insurance Corporation, a California corporation, the activities of which were controlled by substantially the same set of officers and directors as were prior to the appointment of the receiver in the State of Delaware in control of the business of the International Re-Insurance

Corporation, a Delaware corporation, respondent herein, first obtained its certificate of authority to do business as a reinsurance corporation in the State of California on the 29th day of July, 1928; that said business conducted by said International Re-Insurance Corporation, a California corporation, continued operating under said certificate issued by the Division of Insurance of the State of Califorina as a California corporation engaged in the reinsurance business until on or about the 31st day of October, 1931, at which time there was organized the International Re-Insurance Corporation, a Delaware corporation; that said International Re-Insurance Corporation, a Delaware corporation, respondent herein, obtained a certificate of authority to engage in the reinsurance business in the State of California on or about the 31st day of October, 1931.

Further affiant sayeth not.

J. L. Maritzen.

Subscribed and sworn to before me this 25th day of May, 1933. Marie B. Jackson, Notary Public in and for Said County and State. My com. ex. 7-17-35. (Seal.)

[fol. 58] EXHIBIT "A" TO AFFIDAVIT

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES

No. 356069

E. FORREST MITCHELL, as Insurance Commissioner of the State of California, Petitioner,

vs.

INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation, Respondent

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

It appearing from the petition of the above named petitioner on file herein that good cause exists therefor, and petitioner in said petition having applied therefor,

It is hereby ordered that International Re-Insurance Corporation, a corporation, respondent named in the above-entitled proceeding, appear before the above-entitled court on Friday, the 28th day of April, 1933, at 10:00 o'clock A. M. on said day in the court room of Department 47 in the City Hall in the City of Los Angeles, County of Los Angeles, State of California, then and there to show cause if any it has why the above-entitled court should not make its order (1) directing said respondent [fol. 59] corporation to show cause why petitioner should not take possession of the property of said respondent corporation in the State of California and conserve the assets of said respondent corporation in the State of California for the benefit of its creditors, (2) directing said respondent corporation to show cause why there should not be made such other order as the nature of the case and the interests of the policyholders, the bondholders and creditors of said respondent corporation and the interests of the public may require, (3) enjoining and restraining said respondent corporation and its officers, agents and employees from the transaction of the business of said respondent corporation and from disposing of any of the property of said respondent corporation until the further order of this court, (4) that all creditors of the respondent corporation, all claimants against the said respondent corporation and all other persons be enjoined from instituting or maintaining any suit or action or proceeding at law or in equity against said respondent corporation and from attaching or executing upon, or taking any other legal step or proceeding against any property of said respondent corporation within the State of California and from doing any act interfering with the possession and administration by petitoner of said property, (5) directing petitioner forthwith to take possession of the property of said respondent corporation in the State of California and conduct the business of said corporation in said state until the further order of this court, (6) for [fol. 60] the publication of due notice to all creditors of respondent corporation requiring them to duly file their claims with petitioner in the manner and within the time to be prescribed by the court, (7) for the liquidation of the business of said respondent corporation in the State of California by and under the direction of petitioner and

his successors in office, and (8) for such other and further relief as may be meet in the premises;

And it is further ordered that, pending the further order of this court, said respondent corporation be, and it is hereby restrained and enjoined from transacting any business through respondent or through any officer, agent or employee of said respondent; that said respondent and its officers, agents and employees be and they are hereby enjoined and restrained from disposing of any property of said respondent corporation and that the above mentioned petitioner forthwith take and retain possession of all property of respondent corporation located in the State of California pending the further order of this court.

This order may be served at any time on or before the — day of May, 1933.

Done in open court this 19th day of April, 1933.

Hartely Shaw, Judge of the Superior Court.

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT ON MOTION FOR REHEARING

STATE OF CALIFORNIA,
County of Los Angeles, ss:

John L. Flynn, being first duly sworn, on oath deposes and says:

That he is an attorney at law, duly admitted to practice in all the Courts of the State of California and in the United States District and Circuit Courts; that Frank L. Guerena, Esquire, is the attorney for the Insurance Commissioner of the State of California with offices at San Francisco, California; that in the presentation of the motion of the Insurance Commissioner of the State of California to vacate and set aside the order heretofore entered in the above-entitled Court appointing W. H. Comstock an ancillary receiver in this district, said Frank L. Guerena was unable, by reason of the brevity of time and the fact [fol. 62] that his office is removed five hundred miles from the place where this proceeding is pending, to ascertain and familiarize himself with all of the facts relative to the

steps taken by the deputies, officers and other employees of the Division of Insurance of the State of California, located in the Los Angeles office of said Division of Insurance; that said Frank L. Guerena was further handicapped in that he was required to be present in Washington, D. C., under subpoena issued and served upon him by the United States Marshal requiring his attendance at impeachment proceedings now pending in the United States Senate, and that he is now in attendance at said hearing; that by reason of the foregoing, your affiant is of the belief that all of the facts involved in the matter of the appointment of receiver of respondent corporation herein were not fully disclosed from the standpoint of the activities of the Insurance Commissioner of the State of California and the proceedings instituted by the Insurance Commissioner of the State of California in and for the County of Los Angeles.

That at about three o'clock in the afternoon of April 19, 1933, your affiant and Bernon F. Mitchell, Deputy Insurance Commissioner of the State of California, went to the office of the International Re-Insurance Corporation, located in the Pacific Finance Building, 621 South Hope Street, Los Angeles, California, pursuant to telephone appointment theretofore made by said Bernon F. Mitchell with one Emil Johnson, Vice-President of said International [fol. 63] Re-Insurance Corporation; that when your affiant and said Bernon F. Mitchell arrived at the office of said International Re-Insurance Corporation, a corporation, said Emil Johnson was at said time in conference with the counsel for said respondent corporation, whose address was not made known to your affiant; and said Bernon F. Mitchell; that your affiant and said Bernon F. Mitchell went to the office of said International Re-Insurance Corporation for the purpose of interviewing said Emil Johnson relative to the taking over, under the Liquidation Act of the State of California, the books, records and assets of the International Re-Insurance Corporation located in Los Angeles, California; that your affiant and Bernon F. Mitchell, upon ascertaining that said Emil Johnson was not at his office, then returned to the office of the Liquidation Department of the Division of Insurance, whereupon your affiant proceeded to the Clerk of the Superior Court of the State of California in and for the County of Los Angeles, and filed the action for liquidating said Interna-

tional Re-Insurance Corporation, being Action Number 356069.

Further your affiant sayeth not.

John L. Flynn.

Subscribed and sworn to before me this 24th day of May, 1933. Marie B. Jackson. Notary Public in and for said County and State. My Com. Expires 7-17-35. (Seal.)

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

POINTS AND AUTHORITIES

I. Motion for rehearing of interlocutory order or decree may be made at any time during the term of Court at which same was entered.

Rule 69, Federal Equity Rules.

II. The Court which first obtains the possession of the property by a recognized mode of judicial seizin is entitled to retain said property without regard to which suit was first filed.

Knott vs. Evening Post Co., 124 Fed. 342.

III. Where the property is in the possession of one Court, another court of concurrent and co-ordinate jurisdiction cannot remove the property from the Court already in possession.

Welch vs. Union Casualty Co., 238 Fed. 968;
Empire Trust Co. v. Brooks, 232 Fed. 641;
Moran vs. Sturges, 154 U. S. 256;
Heidretter v. Elizabeth Oil Cloth, 112 U. S. 294.

[fol. 65] IV. The proceeding being in rem, the court which first takes possession through a receiver obtains jurisdiction which is exclusive and not subject to interference by any other court.

Tardy's Smith on Receivers, 2nd Ed., Vol. 2, page 1801.

V. The proceeding here, together with the proceeding in the State Court, are not of such nature that the mere filing of the petition constitutes constructive possession.

Respectfully submitted, Frank L. Guerena, by John L. Flynn, Attorney for Insurance Commissioner, State of California.

[Endorsed]: Received copy of the within Motion Newlin & Ashburn. this 24 day of May 1933 Newlin & Ashburn C. J. Harrison, Attorney for Complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN OPPOSITION TO MOTION FOR RE-HEARING—
Filed May 29, 1933

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Gurney E. Newlin, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before this court.

[fol. 66] That he has read the affidavits of J. L. Maritzen and John L. Flynn offered by the Insurance Commissioner of the State of California in support of a motion for re-hearing of the motion heretofore made by said Insurance Commissioner on May 8, 1933, in the above-entitled matter, which motion was denied by order of this court on May 12, 1933.

That the facts set forth in the affidavit of said J. L. Maritzen on page 1 thereof, and in the first nineteen lines of the second page thereof, and in the last paragraph of the affidavit of John L. Flynn, contain only a more elaborate statement of the same facts which were presented to this court on the hearing of the former motion by the affidavit of Bernon F. Mitchell and which were considered by this court in arriving at its former decision; that the only relevancy that these facts appear to have with respect to the matter before the court arises from the implications therein contained that the proceedings in this court where-

in the ancillary receivers were appointed were undertaken after the State Insurance Commissioner had informed the local office of International Re-Insurance Corporation that a receiver had been appointed for said corporation in the State of Delaware, and that the proceedings in this court were brought to defeat the purpose of the State Insurance Commissioner in filing a liquidation proceeding in the State Court.

That the true facts are that your deponent was informed by telephone from Wilmington, Delaware, at ten-thirty o'clock A. M. on April 19th that the Chancery Court of the State of Delaware had appointed receivers for said International Re-Insurance Corporation with power to apply for ancillary receivers in all of the jurisdictions where [fol. 67] said corporation had assets or was doing business; that your deponent, as attorney for said primary receivers, was instructed to take necessary steps to obtain the appointment of ancillary receivers in the Southern Judicial District of California as part of a plan of country-wide ancillary receiverships that would aid in administering the assets of International Re-Insurance Corporation in cooperation with the primary receivers and thus avoid piecemeal and conflicting administrations in various jurisdictions and consequent waste and loss of assets; that pursuant to said instructions your deponent instructed C. J. Harrison, an associate in his office, to prepare the necessary pleadings in connection with the proceeding to have ancillary receivers appointed by this court; that when said pleadings were prepared your deponent, with said C. J. Harrison, his associate, came to this court and filed the suit; that prior to the filing of said proceeding your deponents had no knowledge that the State Insurance Commissioner had prepared and was filing a proceeding in the State Court; that the proceeding in this court was not an attempt to defeat the purpose of any proceeding in the State Court of which your deponent had knowledge; that the sole purpose of filing proceedings in this Court, as above stated, was pursuant to instructions of said primary receivers and to obtain the appointment of ancillary receivers in aid of and cooperation with the primary receivers appointed by the Chancery Court of the State of Delaware.

[fol. 68] The remainder of the affidavit of said J. L. Maritzen contains only facts which were placed before this

court on the hearing of the former motion of the State Insurance Commissioner and were considered by this court in coming to its decision denying the said former motion; that the remainder of the facts set forth in the affidavit of said John L. Flynn giving alleged reasons why said State Insurance Commissioner does not believe that the facts of this case were heretofore fully presented to this court do not constitute facts showing discovery of new evidence or errors of law warranting a rehearing and therefore do not require answer by your deponent, who, however, does state that all of the facts and all of the points of law raised by the motion for re-hearing were presented in detail to this court for its consideration on the former motion.

Gurney E. Newlin.

Subscribed and sworn to before me this 29th day of May, 1933. Effie D. Botts. Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[Endorsed]: Received copy of the within affidavit this 29th day of May, 1933 Frank L. Guerena Attorney for Intervener.

[File endorsement omitted.]

[fol. 69] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR REHEARING—June 13, 1933

The Court having heard argument of counsel on Motion of E. Forrest Mitchell, Insurance Commissioner, for rehearing of Order Denying Motion of E. Forrest Mitchell, Insurance Commissioner, State of California, to vacate order appointing Receivers, to Dissolve Restraining Order, to Dismiss Petition for Appointment of Receivers, and to Re-examine ex parte Order Appointing Receivers, pursuant to Notice and Motion filed May 26th, 1933; and, under date of May 29th, 1933, the Court having ordered this cause stand submitted, and having fully considered this cause, and being now fully advised herein, said Motion is ordered denied, allowing an exception thereto.

[fol. 70] PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT —Filed July 13, 1933.

The petition of E. Forrest Mitchell, Insurance Commissioner of the State of California, appellant, herein respectfully represents:

I

That appellant, considering himself aggrieved by the decision of the District Court of the United States, for the Southern District of California, Central Division, the intervenor therein, denying the motion of said intervenor to vacate, set aside and annul the order appointing George DeBienvill Kiem and W. H. Comstock, ancillary co-receivers, and the order and decision entered on the 13th day of June, 1933, denying the motion for rehearing of the order denying the motion to vacate, set aside and annul the order appointing said ancillary co-receivers, hereby prays that an appeal be allowed to the United States Circuit Court of Appeals, for the Ninth Circuit herein, and for an [fol. 71] order fixing the amount of the bond thereon.

Frank L. Guerena, by John L. Flynn, Attorneys for Intervenor, E. Forrest Mitchell, Insurance Commissioner of the State of California.

[Endorsed]: Received copy of the within Petition for Appeal this 13th day of July, 1933. Newlin & Ashburn C. J. Harrison, attorneys for complainant.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERROR—Filed July 13, 1933

Comes now E. Forrest Mitchell, Insurance Commissioner of the State of California, appellant in the above entitled cause, and respectfully submits that in the record, proceedings, decision and order of the District Court of the United States, for the Southern District of California, Central Division, in the above entitled matter, there is manifest error, in this, to-wit:

1. The District Court of the United States, for the Southern District of California, Central Division, erred in deny-

ing the motion of E. Forrest Mitchell, Insurance Commissioner of the State of California, as intervenor, to vacate, annul and set aside the order appointing George DeBienvill Kiem and W. H. Comstock ancillary co-receivers;

2. That the District Court of the United States, for the Southern District of California, Central Division, erred in [fol. 72] deciding that the above entitled court first acquired jurisdiction for the appointment of ancillary co-receivers of the respondent corporation;

3. That the District Court of the United States, for the Southern District of California, Central Division, erred in holding that the Superior Court of the State of California, in and for the County of Los Angeles, and intervenor herein, is without jurisdiction to proceed with the liquidation of the respondent corporation;

4. That said District Court of the United States, for the Southern District of California, Central Division, erred in denying the motion for rehearing of the order and decision denying the motion of E. Forrest Mitchell, Insurance Commissioner of the State of California, intervenor, to vacate, annul and set aside the appointment of George DeBienvill Kiem and W. H. Comstock as ancillary co-receivers.

Wherefore, appellant prays that the said orders and decisions of the said District Court of the United States, for the Southern District of California, Central Division, dated June 13th, 1933, in the above entitled cause be reversed and a judgment rendered in favor of said appellant, and for costs.

Frank L. Guerena, by John L. Flynn, Attorneys for Appellant.

[Endorsed]: Received copy of the within Assignment of Errors this 13th day of July 1933 Newlin & Ashburn C. J. Harrison attorneys for complainant.

[File endorsement omitted.]

[fol. 73] In United States District Court

Order Allowing Appeal—Filed July 14, 1933

The appellants in the above entitled suit, and each of them, having prayed for the allowance of an appeal in this

cause to the United States Circuit Court of Appeal for the Ninth Circuit, from the order and decree made and entered in the above entitled suit by the District Court of the United States, Southern District of California, Central Division, on the 12th day of May, 1933, denying the motion of E. Forrest Mitchell, Insurance Commissioner of the State of California, appellant herein, to vacate, set aside and annul the order appointing George De Bienville Kiem and W. H. Comstock, ancillary co-receivers and from the order and decree entered on the 13th day of June, 1933, denying the motion of E. Forrest Mitchell, Insurance Commissioner of the State of California, appellant, for rehearing of the order entered on the 12th day of May, 1933, denying the motion of said appellant to vacate, set aside an annul the order appointing said ancillary co-receivers, and from each and every part thereof, and having prepared and filed his petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the United States Circuit Court of Appeal for the Ninth Circuit in this cause, as provided by law, and it is further ordered that the clerk of the court appealed from shall prepare and certify a transcript of the record, proceedings, and order and decree in this cause and transmit the same to the United States Circuit Court of Appeal for the Ninth Circuit, so that he shall have the same [fol. 74-76] in said court within 30 days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of $250.00.

Geo. Cosgrave, Judge of the District Court of the United States.

[File endorsement omitted.]

Bond on Appeal for $250,000, approved and filed July 15, 1933, omitted in printing.

[fol. 77] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR RECORD—Filed July 26, 1933

To the clerk of the above entitled court:

You are requested to make a transcript of record to be filed in the Circuit Court of Appeals for the Ninth Circuit

pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following papers and exhibits, to-wit:

1. Petition for Appeal.
2. Assignment of Errors.
3. Order Allowing Appeal and First Bond.
4. Citation on Appeal.
5. Bond.
6. Præcipe for transcript of record.
7. Petition for Appointment of Ancillary Receiver.
8. Order appointing ancillary receivers.
9. Amendments to receivers' bill of complaint.
10. Answer of Respondent, International Re-Insurance Corporation.
11. Order amending order appointing ancillary receivers. (Corrects California to Delaware.)

[fol. 78] 12. Motion to vacate order appointing receivers to dissolve restraining order to dismiss petition for appointment of receivers and to examine the ex parte order appointing the receivers.

14. Affidavit of Emil Johnson in opposition to motion of E. Forrest Mitchell, as Insurance Commissioner of California.
15. Order denying motion of Insurance Commissioner.
16. Motion for Rehearing of Order Denying motion of E. Forrest Mitchell, Insurance Commissioner of the State of California to vacate order appointing receivers to dissolve restraining order, to dismiss petition for appointment of receivers and to re-examine ex parte order of receivers.
17. Affidavit of J. L. Meritzen on motion for rehearing including Exhibit "A" (order to show cause and temporary restraining order).
18. Affidavit of Gurney E. Newlin in opposition to motion for rehearing.
19. Affidavit of John L. Flynn on motion for rehearing.
20. Minute order denying motion for rehearing.

Respectfully, Frank L. Guerena, by John L. Flynn, Attorneys for E. Forrest Mitchell, Insurance Commissioner.

[Endorsed]: Receipt of copy of the within instrument is acknowledged this 26th day of July, 1933. Overton, Lyman & Plumb, by J. Kline.

[File endorsement omitted.]

[fols. 79-80a] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL—Filed Sept. 1, 1933

Whereas, E. Forrest Mitchell, Insurance Commissioner of the State of California, Intervenor and Appellant, has taken an appeal from the order denying his motion to vacate order appointing ancillary receivers; and,

Whereas, the printed transcript of the record on appeal heretofore printed has omitted therefrom the affidavit of Bernon F. Mitchell in support of motion of E. Forrest Mitchell, as Insurance Commissioner of the State of California, to vacate order appointing ancillary receivers; and,

Whereas, the printed transcript of the record on appeal fails to disclose the time in which the petition of E. Forrest [fol. 82] Mitchell, as Insurance Commissioner of the State of California, for liquidation of the International Re-Insurance Corporation, a corporation, was filed in the Superior Court of the State of California, in and for the County of Los Angeles.

Now, therefore, it is hereby stipulated by and between the parties hereto, through their respective attorneys, as follows:

1. That a supplemental transcript of the record on appeal be prepared including as a part thereof the affidavit of Bernon F. Mitchell, in support of motion of E. Forrest Mitchell, as Insurance Commissioner of the State of California, to vacate order appointing ancillary receivers.

2. That said supplemental transcript shall include as a part thereof the within stipulation, and

3. That the petition of E. Forrest Mitchell, Insurance Commissioner of the State of California, for the appointment of said Insurance Commissioner as liquidator of the International Re-Insurance Corporation, a corporation, was filed in the Superior Court of the State of California, in and for the County of Los Angeles, on the 19th day of April, 1933, at 4:54 P. M., as cause No. 356069, entitled E. Forrest Mitchell, as Insurance Commissioner of the State of California, Petitioner, vs. International Re-Insur-
[fol. 83] ance Corporation, a corporation, Respondent.

U. S. Webb, Attorney General, by John L. Flynn, Deputy Attorney General, Attorneys for E. Forrest Mitchell, Insurance Commissioner of the State of California. Brown, Bissell & Berry, by Ben S. Berry, Attorneys for Respondent. Overton, Lyman & Plumb, by C. L. McGaughey, Attorneys for Receiver.

[File endorsement omitted.]

[fol. 84] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF BERNON F. MITCHELL IN SUPPORT OF MOTION OF E. FORREST MITCHELL, AS INSURANCE COMMISSIONER OF CALIFORNIA—Filed May 2, 1933

STATE OF CALIFORNIA,
County of Los Angeles, ss:

Bernon F. Mitchell, being first duly sworn, deposes and says: That he is, and at all times herein mentioned has been, a deputy to E. Forrest Mitchell, Insurance Commissioner of California, that as such deputy affiant has, and has had access to and familiarity with the official records [fol. 85] of the Division of Insurance of the State of California and of the offices of the Insurance Commissioner of said State;

That International Re-Insurance Corporation, organized and existing under the laws of Delaware was the only

insurance company of that name operating or certificated by said Insurance Commissioner to operate as an insurance company in the State of California on April 19, 1933; that an insurance company named International Re-Insurance Corporation, organized under the laws of the State of California, was in existence but was not operating as an insurance company, nor was it certificated or licensed to act as an insurance company in California, on April 19, 1933, and that said corporation has been in existence ever since said date and is now in existence;

That Carl M. Hansen, one of the petitioners named in the petition for appointment of ancillary receivers filed in the above-entitled proceeding, prior to April 19, 1933, was on said date, *was* and now is, an officer of International Re-Insurance Corporation organized and existing under the laws of Delaware;

That on March 30, 1933, the said Insurance Commissioner suspended the certificate of authority or license of International Re-Insurance Corporation, the company organized and existing under the laws of Delaware, to transact in California the business of workmen's compensation insurance; that said suspension was in effect on April 19, 1933; and that said suspension has ever since continued in effect;

That on April 19, 1933, said Insurance Commissioner filed in the Superior Court of the State of California in [fol. 86] and for the County of Los Angeles, a petition in a proceeding therein numbered 356069 against International Re-Insurance Corporation, organized and existing under the laws of Delaware, alleging that said company has assets in California, that it has been authorized to transact insurance business in California, that it had its principal place of business in the City of Los Angeles, that it has been subject to examination by said Commissioner and subject to his supervision under the laws of California, that said Commissioner had made an examination of the business and affairs of said company, that it appeared to said Commissioner, as result of said examination, that said company was in such condition that its further transaction of business in California would be hazardous to all concerned, and that said Commissioner was advised that said company was in the hands of a receiver in the State of Delaware; and said petition asked said court that said Com-

missioner be placed in possession of the property and business of said company in California and that said Commissioner be appointed to liquidate the business and affairs of said company in California after due notice and hearing;

That on April 19, 1933, said Superior Court, acting upon said petition of said Commissioner, issued an order to show cause against International Re-Insurance Corporation, of Delaware, returnable in said court on April 28, 1933, and issued a temporary restraining order directed against said company enjoining it from transacting any further busi- [fol. 87] ness in California and from disposing of any of its property in California and ordering said Commissioner to immediately take and retain possession of the business and property of said company in California until the further order of said court; that said order to show cause and temporary restraining order were duly served on said company during the morning of April 20, 1933, and that said Commissioner took actual possession of the property of said company in the County of Los Angeles and in the City and County of San Francisco during the morning of April 20, 1933, at which time he served upon said Company the following order:

"E. Forrest Mitchell, Insurance Commissioner, State of California, Department of Investment, Division of Insurance, 901 California State Building, Los Angeles

In the Matter of INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation

Order to Seize and Take Possession

Whereas, it has been disclosed by official examination and does appear to the Insurance Commissioner that International Re-Insurance Corporation, a corporation, organized and existing under the laws of the State of Delaware, [fol. 88] and qualified to transact business under the Insurance Laws of the State of California, is insolvent; and

Whereas, it is found, after such examination, that said International Re-Insurance Corporation, a corporation, is in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; and,

Whereas, it appears to the Insurance Commissioner that irreparable loss and injury to the property and business of said International Re-Insurance Corporation, a corporation, has occurred or may occur unless the Insurance Commissioner take immediate charge of the property, business and affairs of said International Re-Insurance Corporation, a corporation,

Now, therefore, Pursuant to the authority vested in me by law, to-wit, by an act of the Legislature of the State of California entitled 'An act to provide for proceedings against the liquidation of delinquent insurance corporations and associations,' approved April 30, 1919,

It is ordered that I, E. Forrest Mitchell, Insurance Commissioner of the State of California, forthwith, without notice, seize and take possession of the property and business of said International Re-Insurance Corporation, a corporation, its books, records and accounts and the offices and premises occupied by it for the transaction of its busi- [fol. 89] ness, and retain possession of the same subject to the order of the Court.

And for the purpose of this Order, I hereby require the aid of all peace officers to enforce such seizure and possession.

Given at Los Angeles, California, this 20th day of April, 1933, under my hand and the official seal of my office.

E. Forrest Mitchell, Insurance Commissioner, by H. F. Risbrough, Deputy." (Seal.)

That the restraining order issued by the above-entitled court in the above-entitled proceeding on April 20, 1933, was served on said Commissioner during the afternoon of April 21, 1933;

That said Commissioner had no notice of the filing of the petition in the above-entitled proceeding or of the order therein made until the afternoon of April 20, 1933, although said Commissioner had notified said Delaware company of his intention to file the aforesaid petition on the afternoon of April 19, 1933, and before the above-entitled proceeding was filed.

That the hearing on the order to show cause issued by said Superior Court upon the filing of said petition by said Commissioner was continued by said court from April 28, 1933, to May 10, 1933, in view of the pendency of the above-

[fol. 90] entitled proceeding and the issuance by the above-entitled court of its order of April 20, 1933, appointing ancillary receivers herein.

Bernon F. Mitchell.

Subscribed and sworn to before me this 1st day of May, 1933. Kathryn Buckman, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[Endorsed:] Affidavit of Bernon F. Mitchell in Support of Motion of E. Forrest Mitchell. Received Copy May 2, 1933. Newlin & Ashburn, C. J. Harrison, Attorneys for Plaintiff.

[File endorsement omitted.]

[fols. 91 & 92] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 93 & 94] IN UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

E. FORREST MITCHELL, Insurance Commissioner of the State of California, Intervenor and Appellant,

vs.

BERTHA E. MAURER, Complainant and Appellee; INTERNATIONAL RE-INSURANCE CORPORATION, a Corporation, Respondent and Appellee

[fol. 95] No. 7262

ORDER OF SUBMISSION—Nov. 21, 1933

Ordered appeal in above cause argued by Mr. Frank L. Guerena, counsel for appellant, and by Mr. C. L. McCaughey, counsel for appellees, and submitted to the court for consideration and decision.

[fol. 96] In United States Circuit Court of Appeals

Order Directing Filing of Opinion and Filing and Recording of Decree—Feb. 26, 1934

By direction of the court, ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[fol. 97] In United States Circuit Court of Appeals

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Before Wilbur, Sawtelle and Garrecht, Circuit Judges

Opinion—Filed Feb. 26, 1934

Sawtelle, Circuit Judge:

Since the precise sequence of events is of crucial importance in determining the question presented by this appeal, involving as it does priority of jurisdiction as between a Federal and a State court, we will give a chronological statement of the facts.

1. The appellee corporation was organized under the laws of Delaware. Prior to April 19, 1933, it was authorized to transact and was engaged in the business of insurance in California under a certificate of authority issued by the appellant.

2. On March 23, 1933, in the Court of Chancery for New Castle County, Delaware, the appellee Maurer filed a bill for the appointment of a receiver for the appellee corporation. The complaint recited that the appellee Maurer had recovered a judgment against Fred Sauderoff in a New Jersey court, for $20,000; that of this amount $5,000 was covered by a casualty insurance policy in favor of Sauderoff issued by the Commonwealth Casualty Company of Pennsylvania, which, it was alleged, was a predecessor in interest of the appellee corporation; that by reason of an

[fol. 98] alleged merger with the Commonwealth Company, the appellee corporation is indebted to the appellee Maurer in the sum of $5,000; and that the appellee corporation was insolvent.

3. On March 30, 1933, the appellant suspended the right of the appellee corporation to transact the business of workmen's compensation insurance in California. That suspension was in effect on April 19, 1933.

4. On April 19, 1933, at an undisclosed hour, on motion of the solicitor for the complainant-appellee Maurer for a decree pro confesso, the Chancellor of the Delaware court appointed three receivers for the appellee corporation, as set forth more fully infra.

5. On April 19, 1933, at 4:45 p. m., a bill of complaint, apparently verified on April 18, 1933, was filed in the court below, the pleading being entitled a "Petition for Appointment of Ancillary Receiver", and bearing the caption of "Bertha E. Maurer v. International Re-Insurance Corporation", etc. The preamble of the pleading, however, recited that it was "The petition of Arthur G. Logan, Carl M. Hansen and George de Bienzille (sic) Keim," who, the petition alleged and the record so shows, were appointed receivers for the appellee corporation by the Delaware court.

6. On April 19, 1933, at 4:54 p. m., in the Superior Court for the County of Los Angeles, California, the appellant filed a petition praying inter alia, that he be placed into [fol. 99] possession of the property and business of the appellee corporation. That court will hereinafter be referred to as "the state court."

7. On April 19, 1933, at an undisclosed hour, the court below signed an order appointing Keim and W. H. Comstock ancillary receivers of the appellee corporation, and enjoining any one else from interfering with its property.

8. On April 19, 1933, at an undisclosed hour, the state court issued a temporary restraining order against the appellee corporation enjoining it from disposing of its property or transacting business in California, and ordering the appellant "into the actual possession of said property."

9. On April 20, 1933, at 9:30 a. m., the temporary restraining order of April 19, 1933, supra, an order against the appellee corporation to show cause, and a copy of the petition, filed in the state court, were served on Emil Johnson, as vice president of the appellee corporation. The order to show cause was returnable on April 28, 1933.

10. On April 20, 1933, at an hour subsequent to 9:30 a. m. and variously indicated as having been prior to 12:20 p. m. or prior to 2 p. m. or shortly afterward, Comstock served on Johnson a copy of the order of the court below appointing the ancillary receivers, and told Johnson that "until further orders" the latter "was to regard himself as an agent and employee of said ancillary receivers."

11. On April 20, 1933, at an hour variously indicated as having been 12:20 p. m. or about 2 p. m., as already stated, [fol. 100] Johnson exhibited to two deputies of the appellant the order appointing ancillary receivers.

12. On April 20, 1933, at a time variously stated in the record to have been in the morning or at two in the afternoon, two deputies of the appellant served Johnson with an "Order to Seize and Take Possession", signed not by the state court of California, but by the appellant himself, through a deputy.

13. On April 20, 1933, at 1:50 p. m., the order of the court below appointing ancillary receivers and restraining all other persons from interfering with the property of the appellee corporation, was filed in the court below.

14. On April 21, 1933, in the afternoon, a certified copy of the order of the court below appointing ancillary receivers was served upon the appellant, through two deputies. A copy of the restraining order by the court below was also served on the appellant, on the same afternoon.

15. On April 25, 1933, various amendments to the bill of complaint were filed in the court below, together with a new "petition for the appointment of ancillary receiver, including the amendments, and together with an exemplified copy of the bill of complaint filed in the Delaware court, and other papers."

16. On April 25, 1933, the appellee corporation filed its answer to the bill of complaint in the court below, admitting

all the allegations of the bill, and consenting to the appointment of an ancillary receiver or receivers.

[fol. 101] 17. On a date undisclosed by the record, the state court in California continued the hearing on the order to show cause from April 28, 1933, to May 10, 1933, in view of the pendency of the proceedings in the court below.

18. On May 2, 1933, the appellant served upon the appellee corporation and filed in the court below a "motion to vacate the order appointing receivers," etc., "to dismiss the petition for the appointment of receivers, and to reexamine the ex parte order appointing the receivers."

19. On May 12, 1933, the court below denied the appellant's motion to vacate the order.

20. On June 13, 1933, a motion to rehear the appellant's motion to vacate the order appointing receivers, etc., which motion to rehear was filed by the appellant on May 26, 1933, was denied by the court below.

21. From the orders of the court below of May 12, 1933, and of June 13, 1933, supra, the present appeal was taken.

There are several preliminary questions to be disposed of before we address ourselves to the main issue.

In the first place, the status of the appellant as a party herein has been seriously brought into question. In the captions of the transcript of record, of the supplemental transcript of record and of the various briefs, the appellant is designated as "intervenor." In the appellant's petition for appeal, in his assignments of error, in his cost bond, in the stipulation re supplemental transcript of record on [fol. 102] appeal, and, finally, in the specifications of error in his own brief, the appellant is repeatedly referred to as "intervenor." He is therefore clearly in error when he states, in his supplemental brief, that "The only reference in the record to appellant as 'intervenor' is on Page 71, where counsel for the State Insurance Commissioner signed the petition for appeal as 'attorneys for intervenor', and in the cost bond (Tr. p. 75), * * *," and that "The assignments of error (Tr. p. 72) * * * properly refer to the Commissioner as the 'appellant'."

In view of these frequent references by the appellant to himself as "intervenor," we regard as quite pardonable the error of the appellees in accepting the appellant's own

designation of himself, and devoting the first thirteen pages of their brief to the proposition that "the right of intervention must be in subordination to and in recognition of the main proceeding."

Nevertheless, a careful study of the record and of the law applicable thereto convinces us that the appellant has brought himself into court—not, indeed, as intervener, but by his motion to vacate the order of the court below appointing the ancillary receivers, as set forth above. The order of the lower court contained an injunction in the following language, the italics being our own:

"It is further ordered, adjudged and decreed that the said respondent and each and every of its agents and employees, and all the creditors of the respondents and all [fol. 103] * * * *commissioners and all deputies* * * * and generally *all persons* * * * *whatsoever* are hereby enjoined from removing, transferring, disposing," etc.

We believe that the language of the above injunction was sufficient to bring the appellant into court and to authorize his filing of the motion to vacate. It will be remembered that a certified copy of the restraining order of the court below was served upon the appellant, on the day after the order was filed.

In Mitchell v. Lay, 48 F. (2) 79, 84-85, this court said:

"At this juncture we pause to consider appellee's motion to dismiss so far as the motion is based upon the claim that the appellant is not entitled to appeal from the order granting the injunction or from the order refusing to vacate the receivership on the ground that the appellant is not a party to the action, and that the appellant did not ask permission to intervene in the action, that therefore he is a stranger to the action and not entitled to appeal from the orders made. It is true that the appellant is not a party to the original action, but when he was brought into court by the process of the court at the instigation of the parties to the action or of the receiver he bacem a party to the ancillary proceedings and entitled to appeal from the judgment rendered against him. The judgment therein rendered [fol. 104] was as to him final and appealable as such." [Cases cited, including O'Neil v. Welch and Ward v. Foulkrod, infra.]

Certiorari was denied in Mitchell v. Lay, 283 U. S. 864, and the case was cited with approval, on the very point discussed in the foregoing excerpt, in Johnson v. Manhattan Ry. Co., 289 U. S. 479, 495.

Having determined that the appellant is in court, we next turn our attention to the question of whether or not, regardless of priority of jurisdiction as against the state court, the court below had any jurisdiction at all to appoint ancillary receivers.

In the first place, the general rule in the Federal courts is that a receiver in equity has no right to sue in courts of a foreign jurisdiction. Booth v. Clark, 58 U. S. 338, 348-356.

But the rule is subject to the limitation that the objection applies when the attempted suit of the receiver is for the purpose of taking property out of the jurisdiction. This limitation was recognized by Mr. Justice Wayne in the leading case of Booth v. Clark, supra, who said, at Page 352:

"Our industry has been tasked unsuccessfully to find a case in which a receiver has been permitted to sue in a foreign jurisdiction for the property of the debtor."

Again, the following passage on page 356 makes it clear what suits the learned justice had in mind:

"If he seeks to be recognized in another jurisdiction, it [fol. 105] is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability."

A similar limitation of the rule is evidence in another leading case on the subject, Great Western Mining Co. v. Harris, 198 U. S. 561-76:

"The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court

to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered."

Again, this limitation was recognized by the Supreme Court in Sterrett v. Second National Bank, 248 U. S. 73, 76-77, where it said:

"Since the decision of this court in Booth v. Clark, 17 How. 322, it is the settled doctrine in federal jurisprudence that a chancery receiver has no authority to sue in [fol. 106] the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in Booth v. Clark, and have been reiterated in later decisions of this court. Hale v. Allinson, 188 U. S. 56; Great Western Mining Co. v. Harris, 198 U. S. 561, 575, 577; Keatley v. Furey, 226 U. S. 399, 403. This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered and, if necessary, administered."

Indeed, specific recognition of the right of the primary receiver to ask for the appointment of an ancillary receiver in a foreign jurisdiction is contained in the case of Ward v. Foulkrod (C. C. A. 3) 264 F. 627, which is discussed at greater length infra. At page 636 of the opinion, we find the statement that the Chancellor of a Delaware court authorized its receivers "to take such proceedings as may be necessary in the courts of any other state or of the United States to secure the aid of such courts by the appointment of ancillary receivers, or otherwise, in taking possession and charge of the property and assets of the said Badenhausen Company." Similar deference to the rights and powers of courts of foreign jurisdiction was exhibited in [fol. 107] the same Chancellor's amended decree. Similar language was employed by the Delaware Chancellor in the case at bar.

Of such a situation, the court, in Ward v. Foulkrod, supra, said, at pages 636-637:

"These parts of the Chancellor's decree are in complete harmony with the general rule that a receiver, appointed by a court of chancery, has no legal status outside the territorial jurisdiction of the court appointing him. The court has no power beyond the bounds of its jurisdiction, and can confer none upon its receiver. He receives his powers from the court and can only exercise them within its jurisdiction.

* * * * * * *

"What then is to be done?

* * * * * * *

"The appropriate proceeding in such a case as this (which is readily distinguishable from O'Neil v. Welch, supra, and similar cases where the foreign court had no rights to be preserved) is not by application of the receivers appointed by the court of primary jurisdiction addressed to the court of foreign jurisdiction that it summarily discharge its receiver and direct him to turn over to them the corporation's property in his hands, but is by application to that court praying it to discharge its receiver after he has passed his account and appoint ancillary receivers. When the prayer of such a petition has been granted and [fol. 108] ancillary receivers have been appointed, all rights, those of the domiciliary court and of the foreign court, and of all stockholders and creditors of the corporation in both jurisdictions, will fall into their proper places and will be duly cared for and protected in the orderly administration of the estate. * * *

"In order, however, that there shall be no misunderstanding as to what we consider to be the rights of the receivers of the State court in future appropriate proceedings looking to the appointment of ancillary receivers in jurisdictions foreign to that of their appointment, we direct that the order appealed from be modified so as to provide that the dismissal of the petition shall be without prejudice to the right of the Delaware receivers to institute appropriate proceedings for the appointment of ancillary receivers for the property of the corporation now in the hands of the receiver appointed by the District Court of the United States for the Eastern District of Pennsylvania."

See also, Rust v. United Waterworks Co. (C. C. A. 8) 70 F. 129, 133; Seested v. Bonfils, 33 F. (2d) 185, 186.

It is observable that in the instant case the petitioning receivers in the court below did not ask, either in the original or in the amended bill, to be appointed ancillary receivers; and that in the bill as amended they asked that the rights of creditors in the foreign jurisdiction be safeguarded:

[fol. 109] "That this court take such steps as it deems meet and proper to ascertain the indebtedness of respondent, International Re-Insurance Corporation, to the creditors thereof within the jurisdiction of this court, and this court fully administer said respondent's property and assets within this jurisdiction and determine the respective rights, liens and priorities of said respondent's said creditors, and after this court shall have taken such steps with respect to respondent's said property and assets as it shall deem meet and proper in the interests of the creditors within the jurisdiction of this court, that it deliver or cause to be delivered to your petitioners herein the net balance of said property and assets to be remitted to and administered by said Chancery Court of the State of Delaware."

Assuredly such a petition does not come within the strictures of the Supreme Court, in the Great Western case, supra, as to the disregard of the "rights of local creditors."

The appellant insists that neither the original bill of complaint nor the bill as amended was sufficient to confer jurisdiction upon the court below.

Assuming, but not deciding, that the appellant is correct as to the original bill, we will examine his objections to the bill as amended.

First, the appellant complains that the bill as amended fails to allege that the appellee corporation was insolvent, [fol. 110] in that there was an excess of liabilities over assets. But Paragraph 5 of the bill as amended sets forth that "the nature of the cause of action is more particularly referred to in the bill of complaint in the aforesaid [Delaware] action, an exemplified copy of which is hereto annexed and made part hereof by reference." Reference to the latter paper discloses that it specifically sets forth:

"13. That the said respondent corporation is now possessed of certain property, rights and credits, but that said

corporation is insolvent in that it is unable to meet its current and maturing obligations as they fall due."

The appellant also objects that the bill as amended fails to state that the complainant-appellee Maurer is a lien or judgment creditor against the appellee corporation, or that she "had exhausted her legal remedies." Reference again to the Delaware bill, however, reveals that it sets forth that the appellee Maurer recovered a judgment against Fred Sauderoff, in whose favor there was issued a casualty insurance policy for $5,000 by the Commonwealth Casualty Company, alleged to be a predecessor in interest of the respondent-appellee corporation, which Commonwealth Company, acording to the Delaware bill, under the laws of New Jersey, where the judgment was obtained, "became indebted to the complainant in the sum of $5,000."

Furthermore, the foregoing objection as to want to equity may be waived by the answer of the corporation for which [fol. 111] receivers are sought. This doctrine is enunciated in Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 500-501, the sole case cited by the appellant in support of his contention on this point. Comprehensively reviewing the authorities on the subject, the Supreme Court, in the Pusey case, said:

"The case at bar is also unlike Re Metropolitan Railway Receivership, 208 U. S. 90, 109, 110, and many others, in which there was express consent by the corporation to the appointment of the receiver, or where the indebtedness to plaintiff and the corporation's insolvency were admitted, or the lack of jurisdiction in equity waived. The objection that the bill does not make a case properly cognizable in a court of equity does not go to its jurisdiction as a federal court. Smith v. McKay, 161 U. S. 355; Blythe v. Hinckley, 173 U. S. 501. The objection may, as pointed out in Reynes v. Dumont, 130 U. S. 354, 395, be taken by the court of its own motion. But, unlike lack of jurisdiction as a federal court, Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U. S. 379, 382, lack of equity jurisdiction (if not objected to by a defendant) may be ignored by the court, in cases where the subject matter of the suit is of a class of which a court of equity has jurisdiction. And where the defendant has expressly consented to action by the court or has failed to object seasonably, the objection will be treated

as waived. Brown v. Lake Superior Iron Co. 134 U. S. 530, [fol. 112] 535, 536; Southern Pacific R. R. Co. v. United States (No. 1), 200 U. S. 341, 349. In cases relied upon by respondent there was such waiver. But, here, the company strenously insisted throughout upon the absence of jurisdiction and denied every material allegation on which it is sought to support the bill."

In the Metropolitan Railway case, supra, cited by the Supreme Court in the foregoing excerpt, the complainants were not even judgment creditors, in addition to having failed to issue execution on any judgments. Yet in that case the court said:

"It is also objected that the Circuit Court had no jurisdiction because the complainants were not judgment creditors, but were simply creditors at large of the defendant railways. The objection was not taken before the Circuit Court by any of the parties to the suit, but was waived by the defendant consenting to the appointment of the receivers, and admitting all the facts averred in the bill. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 380. That the complainant has not exhausted its remedy at law—for example, not having obtained any judgment or issued any execution thereon—is a defense in an equity suit which may be waived, as is stated, in the opinion in the above case, and when waived the case stands as though the objection never existed.

[fol. 113] "In the case in the Circuit Court the consent of the defendant to the appointment of receivers, without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, amounted to a waiver of that defense." [Cases cited.]

Finally, the appellant asserts that, even in the bill as amended, "Diversity of citizenship is not alleged and no federal question is alleged to exist." But both the original bill and the bill as amended contain, in the preamble, the names of the petitioners, and, by reference to the order signed by the Delaware chancellor, it is apparent that the three petitioners were respectively citizens of Dela-

ware, Pennsylvania and New Jersey. The bill as amended has annexed to it the above-mentioned order of the Delaware chancellor. Both the original bill and the bill as amended recite that the appellee corporation was organized under the laws of Delaawre.

The objection that non-residents of California were suing a Delaware corporation in a Federal court in California [28 U. S. C. A. 112 (a)], was waived by the answer of the appellee corporation. Central Trust v. McGeorge, 151 U. S. 129, 132-33.

Furthermore, in 28 U. S. C. A. 399 we find the following provision:

"Where, in any suit brought in or removed from any State court to any district of the United States, the juris- [fol. 114] diction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceedings *and in the appellate court* upon such terms as the court may impose, so as to show on the record such diverse citzenship and jurisdiction, and thereupon such suit shall be proceeded with the same as though the diverse citzenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal." (Italics our own.)

As for the statutory amount involved, the bill for the appointment of a receiver, filed in the Delaware chancery court, recites that "the respondent [appellee corporation] is indebted to the complainant [appellee Maurer] in the sum of $5,000."

Finally, it has been held that an ancillary suit in a Federal court does not depend on diverse citizenship. In Bluefields S.S. Co. v. Steele (C. C. A. 3), 184 F. 584, 587, the court said:

"While an ancillary proceeding of the kind here considered will be controlled by the court before which it is prosecuted, and in that sense is an independent proceeding, its ultimate object is to aid the purpose of the original suit and in that sense it is ancillary. Jurisdiction in such an ancillary suit therefore no more depends on diversity [fol. 115] of citizenship than it does in a suit ancillary to an original suit pending in the same court. It depends

alone on the existence of an original suit in one court which may properly be aided by proceedings in another court. It is unnecessary to refer to cases in which the federal courts have appointed receivers ancillary to receiverships in other jurisdictions without regard to the citzenship of the parties. There are many of them."

But, argues the appellant, "Assuming that the amendments made to the original bill were sufficient to confer jurisdiction upon the District Court, as a federal court or as a court of equity, to appoint ancillary receivers, the amendments cannot be given retrospective effect in the sense that they must be deemed to have been on file at 4:45 P. M. on April 19, 1933, prior to the filing of the state suit nine minutes later."

The books are against this contention of the appellant's. In Fleischmann Co. v. United States, 270 U. S. 349, 359, the court said:

"It is clear that the amended declaration and petitions did not set up new causes of action, but merely supplemented by appropriate allegations the defective statements of the rights which had existed when the original declaration and petitions were filed; and that the amendments when made related back, by operation of the law, to the dates on which the original suit was brought and the original peti- [fol. 116] tions filed. Texas Cement Co. v. McCord, 233 U. S. 157, 164; Illinois Surety Co. v. Peeler, 240 U. S. 214, 222."

In Columbia Valley R. Co. v. Portland & S. Ry. Co., 162 F. 603, 609, the late Judge Gilbert, of this court observed:

"The theory of chancery practice is that the original bill always remains in force and effect except as to portions thereof which are struck out by amendment, and that amendments averring additional facts may be filed and added thereto as to matters which occurred before the filing of the original bill; but that, when so filed, the amendments relate back to the time of filing the original bill and are incorporated therein, and that all matters occurring subsequent to the filing of the original bill affecting the complainant's right to relief must be presented by a supplemental bill. But in the present case, the appellant did not file amendments to its original bill. Its second amend-

ed bill is a new bill setting forth all the facts on which the appellant's alleged right to relief depends."

In the instant case, the original bill recited that an exemplified copy of the bill of complaint in the Delaware action, a certified copy of the order of the Delaware court appointing the petitioners as receivers, and other papers, were being forwarded to the jurisdiction of the court below, and would be presented, if permitted, to that court. [fol. 117] Furthermore, in the instant case, certain amendments to the bill of complaint were presented to the court below by the three petitioning primary receivers, Arthur G. Logan, Carl M. Hansen and George de Bienzille Keim, with the following statement:

"That said bill heretofore filed, together with the above amendments thereto, shall read as follows:

See also, Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A. 8), 184 F. 199, 205, and Hoover Co. v. Sesquicentennial Exhibition Ass'n, 26 F. (2d) 821, 822.

We therefore conclude that the bill of complaint, at least as amended, supplied all the necessary facts upon which ancillary receivers could be appointed and, when considered in the light of the admissions and consent of the appellee corporation, conferred jurisdiction upon the court below, both as an equity and a federal court.

Accordingly, we now advance to the main question presented by this appeal; namely, Whether the court below or the Superior Court of the State of California in and for the County of Los Angeles, first acquired jurisdiction of the property and affairs of the appellee corporation in the jurisdiction of the court below.

The rule as to priority of jurisdiction in cases of this kind was succinctly stated by the late Mr. Chief Justice Taft in the case of Harkin v. Brundage, 276 U. S. 36, 43-44:

[fol. 118] "The principle that should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the

property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the actual possession of the receiver that determines the jurisdiction. Moran v. Sturges, 154 U. S. 256, 283, 284; Palmer v. Texas, 212 U. S. 118; Wabash Railroad v. Adelbert College, 208 U. S. 38, 54; Farmers' Loan and Trust Company v. Lake Street Railroad Company, 177 U. S. 51, 61; and Adams v. Mercantile Trust Co., 66 F. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same. A doubtful question, too, is whether the bill is of such a character that its filing is the taking of constructive possession of the property."

See also, Kline v. Burke Constr. Co., 260 U. S. 226, 231; McKinney v. Landon (C. C. A. 8) 209 F. 300, 306; Amuse-[fol. 119] ment Syndicate Co. v. El Paso Land Improve. Co., 251 F. 345, 347; Brown v. Pacific Mut. Life Ins. Co. (C. C. A. 4), 62 F. (2d) 711, 714; Christian v. R. Hoe & Co. (C. C. A. 2), 63 F. (2d) 221, 223; Newberry v. Davison Chemical Co. (C. C. A. 4), 65 F. (2d) 724, 728.

We therefore must next address our attention to the question of whether or not, in the instant case, the court below and the state court had, in the language of Harkin v. Brundage, "concurrent and co-ordinate jurisdiction."

In this inquiry it will first be necesary to examine the California statute providing "for proceedings against and liquidation of insurance corporations and associations." That statute is Act 3739, Deering's General Laws of California, 1923, Part One, pages 1372-1376, approved April 30, 1919, Stats. 1919, p. 265, as amended in 1921, Stats. 1921, p. 1017. The pertinent sections of that act follow:

"§ 2. Action by insurance commissioner for order to conduct business of domestic corporation. Whenever any domestic corporation [here follow eight conditions that need not by us be set forth], the insurance commissioner may apply to the superior court, or any judge thereof, in the county in which the principal office of such corporation is located for an order directing such corporation to show cause why the insurance commissioner should not take

possession of its property, and conduct its business, and for such other relief as the nature of the cases and the [fol. 120] interest of its policy-holders, creditors, and the public may require."

"§ 2a. Proceedings against delinquent insurance company. Whenever it shall appear to the insurance commissioner that any person or corporation has committed any of the acts set forth in paragraph two of this act, and that any officer or attorney in fact of such corporation has embezzled or sequestered or wrongfully diverted to his or its own benefit any of the moneys, assets or securities of such corporation, and that irreparable loss and injury to the property and business of such corporation has or may occur unless the insurance commissioner take immediate charge of the property, business and affairs of such corporation, then and thereupon the insurance commissioner shall forthwith, without notice and before applying to the court for any order as herein provided, seize and take possession of the property and business of such person or corporation, its books, records and accounts and the offices and premises occupied by such corporation for the transaction of its business, and retain possession of the same subject to the order of the court; and for such purpose the insurance commissioner may require the aid of all peace officers to enforce such seizure and possession by the insurance commissioner.

"Thereupon the insurance commissioner shall apply to the superior court, or any judge thereof, in the county [fol. 121] where the principal office of such corporation is located for the order provided for in section two of this act, and thereafter shall proceed in such application and in the disposition of the property, business and affairs of said corporation as hereinafter in this act provided."

"§ 3. Injunction by court. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court shall either deny the application or direct such insurance commissioner, or his successor in office, forthwith to take possession of the property and conduct the business of

such corporation, and retain such possession and conduct such business will, on the application either of the insurance commissioner, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the insurance commissioner to take possession has been removed and that the corporation can properly resume possession of its property and the conduct of its business."

"§ 5. Action by insurance commissioner in case of foreign corporations. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions [fol. 122] (a), (b), (c), (d), (e), (f), and (g) of section two of this act exist or arise with reference to any corportion incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver or had its property sequestrated in its domiciliary state or country or in any other state or country, the insurance commissioner may apply to the superior court or any judge thereof in the county in which such corporation has its principal office for the transaction of business in this state, for an order directing such corporation to show cause why the insurance commissioner should not take possession of its property and conserve its assets for the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders or the public may require.

"§ 6. Injunction by court. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation and its officers, agents and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and [fol. 123] after a full hearing the court shall either deny the application or direct the insurance commissioner forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the insurance commissioner, or of such corporation, it shall, after a like hearing, appear

to the court that the ground for such order directing the insurance commissioner to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the insurance commissioner to take possession of the property and conserve the assets of such corporation, the rights and duties of the said insurance commissioner with reference to such corporation and its assets *shall be those heretofore exercised by and imposed upon ancillary receivers* of foreign corporations in this state." (Italics our own.)

"§ 10. Commissioner has powers of receiver. In all cases arising under the provisions of this act where not otherwise provided the powers and duties of the insurance commissioner with relation to the property and assets and business of any corporation placed under his control *shall be those heretofore exercised by and imposed upon receivers* of corporations within this state." (Italics our own.)

[fol. 124] From the foregoing, it will be seen that the insurance commissioner is empowered to bring suit in the superior court. The appellant argues that "the only state statute conferring powers and imposing duties upon a state agency in the matter of the liquidation of an insurance company in an insolvent or hazardous financial condition directs that the Insurance Commissioner proceed in the state court," and that "suit by the State of California, through its Insurance Commissioner, the appellant herein, could not have been instituted in the District Court." The appelles seem to concur in this view, for in their brief they state:

"The fact that the State proceedings could have been brought only in the State Court and could not, therefor, [illegible] the Federal Court, as pointed out on Page 24 of appellant's brief, has no significance, since both courts were seeking to exercise jurisdiction over the same subject matter in similar proceedings for the same end."

This, indeed, seems to be the law. Construing another California statute—the California State Arbitration Act, Title 10, Part 3, of the California Code of Civil Procedure, which, at § 1282, provides that "A party aggrieved by the

failure * * * of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides," etc.—in California Prune & Apricot [fol. 125] Growers' Ass'n v. Catz Amer. Co., 60 F. (2d) 788, 790, we said:

"The act itself discloses that it was the intention of the Legislature to provide a procedure peculiarly adaptable to the state courts of California; and, in view of many of the provisions of the act, it would be difficult if not impossible to harmonize it with the federal law and procedure."

But though it be conceded that the appellant could not have brought his suit in the court below, it by no means necessarily follows that the jurisdictions of the Federal and the state court are not concurrent in this matter.

The appellant, of course, stoutly maintains that the two jurisdictions are either co-ordinate nor concurrent. One of the cases it cites in support of its position is Welch v. Union Cas. Ins. Co., 238 F. 968, 975. The appellant, however, seems to have overlooked the fact that the above case was specifically reversed by the Circuit Court of Appeals for the Third Circuit, in the leading case of O'Neil v. Welch, 245 F. 261, 262-264, 265, 269.

An examination of the facts of that case discloses that it is on all fours with the instant controversy. A statute of Pennsylvania provided that "whenever any domestic insurance company * * * (a) is insolvent," etc., "the Insurance Commissioner may, through the Attorney General, apply to the Court of Common Pleas of Dauphin County, or to the Court of any county in which the princi- [fol. 126] pal office of such corporation is located, for an order directing such corporation to show cause why the Insurance Commissioner should not take possession of its property," etc. From this point we quote directly from the opinion:

"On November 15, 1916, the Insurance Commissioner of the Commonwealth of Pennsylvania, by the Attorney General, filed a suggestion in the Court of Common Pleas of Dauphin County * * * and obtained a rule directed to The Union Casualty Insurance Company * * * 'to

show cause why the Insurance Commissioner should not take possession' * * *

The rule was made returnable November 29, 1916. On that day the Insurance Company appeared and filed its answer to the suggestion, with a prayer that the rule be continued to December 19, 1916. The continuance was granted. On December 18, 1916, the day before the return day of the rule, Homer G. Welch, a citizen of New Jersey, filed a stockholders' bill in the District Court of the United States * * * alleging solvency of the Insurance Company and praying for the appointment of a receiver for the conservation of its property pending the adjustment of its difficulties. Although the Insurance Company had already appeared and answered in the proceeding in the State court, it voluntarily appeared in the Federal court and filed an answer concurrently with the bill, admitting its allegations; [fol. 127] whereupon the Federal court appointed a receiver. The receiver immediately took possession of all assets of the Insurance Company within his reach, and served certified copies of his appointment upon the Attorney General of the Commonwealth of Pennsylvania and upon the judges of the State court."

From the foregoing statement it will be seen that the Pennsylvania statute was even more specific than the California law, as to the court in which the Attorney General might bring suit; namely, a particular court in a particular county. Yet in the face of that specific statute, Judge Woolley had this to say on the subject of the concurrent jurisdiction:

"The starting point in this controversy, therefore is the jurisdiction of the two courts. It cannot be doubted that the Federal court, in the exercise of its general equity jurisdiction, has power to appoint a receiver on a stockholder's bill, determine a corporation's solvency and distribute its assets, and that no State statute can impair or destroy that power. It is equally clear that the State court has power, in the exercise of its special jurisdiction, to determine on the Attorney General's suggestion the solvency of an insurance corporation, deliver its property *to an officer with the function of a receiver,* and distribute its assets; and that there is no Federal statute which impairs or destroys

that power. Therefore, in considering the one question [fol. 128] of priority of jurisdiction, we assume that the Federal and State courts named have concurrent jurisdiction in the appointment of receivers and in administering the affairs of insolvent corporations, *though invoked and proceeded with in different ways.*" (Italics our own.)

Accordingly, the court held:

"We are therefore of the opinion that the State court acquired jurisdiction not only of the corporation but of its property upon the inception of the proceeding, and, being first to acquire jurisdiction, is entitled to retain it until the State has wrought its function and until the jurisdiction invoked has been exhausted."

Another case in point is Ward v. Foulkrod (C. C. A. 3), 264 F. 627, 630, 631-634, in which the opinion was likewise written by Judge Woolley. In August, 1918, Kidwell, a stockholder of Badenhausen Company, a Delaware corporation, filed a bill in the Court of Chancery of the State of Delaware, alleging insolvency of the corporation and praying the appointment of receivers. After service, the defendant appeared, and, by its answer, denied insolvency.

In January, 1919, with the action in the State court pending, Andrew Wheeler and others (citizens of Pennsylvania), creditors of the company, filed a bill against that corporation in a District Court of the United States in Pennsylvania, alleging that the corporation was "unable to pro- [fol. 129] vide for the payment of its obligations now maturing or about to mature," showing generally a situation requiring a receivership to conserve its assets, and praying the appointment of a receiver. Concurrently with the bill, the Badenhausen Company filed its answer, confessing all the allegations of the bill. Thereupon the District Court appointed a receiver.

Ancillary to the receivership thus created by the Federal court in Pennsylvania, receivers were appointed by a Federal court in New Jersey.

In February, 1919, the Chancery court in Delaware entered a decree holding the corporation "insolvent in that it is unable to pay its debts when and as they become due," and appointed receivers. After qualifying, the State receivers, on March 4, 1919, filed a petition in the Pennsyl-

vania Federal court, praying that the latter annul its order appointing a receiver, etc.

With the petition of the State receivers for the annulment of the appointment of the Federal receiver pending in the District Court, Badenhausen Company appealed from the chancery decree that had declared the company to be insolvent. The Supreme Court of Delaware affirmed the decree. 107 A. 297.

Other proceedings, with which we are not here concerned, followed:

"From this recital," said Judge Woolley, "it is clear that there is not that difference in the actions pending in [fol. 130] the two courts—if the jurisdiction thereof be considered as concurrent— which, under the decisions, raises a valid conflict of jurisdiction, and confers priority of jurisdiction on that court which has first seized the property, entitling it to the retention thereof until the conclusion of the litigation."

Though, as we have seen, the complainant in the state action was a stockholder and the complainants in the Federal suit were creditors, the court emphasized that the lack of identity of parties was not crucial in determining the concurrence of jurisdiction. Continuing, Judge Woolley said:

"In these actions, the parties are the same in the sense that each has asked for and has been granted the same relief concerning the same subject matter. The subject matter is precisely the same, being assets and property of the same corporation. The grounds of action, namely, the corporation's inability presently to pay its debts, is the same; and the legal effect of that condition on its solvency however differently it may have been regarded at the commencement of the two suits, is now the same, being established by the decree of the Supreme Court of the State of Delaware, which is binding alike upon the courts of that State and of the United States under the full faith and credit provision of the Federal Constitution * * *

"It appears to us, therefore, that the actions in the two courts are such as clearly come within the rule that the [fol. 131] court in which the first was brought acquired jurisdiction over its subject matter, though possession of

its subject matter was first acquired through judicial seizure by the other court in an action subsequently brought, and that the District Court, on being apprised of the prior jurisdiction in the State court, would, on appropriate proceedings, recognize its infringement of that jurisdiction and surrender its own."

So here. The parties in the two suits asked for the same relief, and in the Federal court that relief—the appointment of a receiver—had been granted. In the State court, the order purported to authorize the appellant to take immediate possession of the corporate property, although Sections 3 and 6, supra, of the Act would seem to require "a full hearing" to be had before the Insurance Commissioner is placed into possession.

Furthermore, the grounds of the action were similar; namely, the bill in the state court alleged that the "company was in such condition that its further transaction of business in California would be hazardous," and asked that the "Commissioner be appointed to liquidate the business."

The bill in the court below, as amended, alleged, by reference to the annexed bill filed in the Delaware chancery court, that the corporation was "insolvent."

Finally, the bill in the court below, besides praying for the appointment of ancillary receivers, asked, as we have seen, that the "court fully administer" the property "and determine the respective rights, liens and priorities" of the [fol. 132] corporation's creditors, "and after this court shall have taken such steps with respect to respondent's said property and assets as it shall deem meet and proper in the interests of the creditors within the jurisdiction of this court, that it deliver or cause to be delivered to your petitioners herein the net balance of said property and assets to be remitted to and administered by said Chancery Court of the State of Delaware."

This, of course, is tantamount to the "liquidation" asked for by the appellant in the state court.

Therefore, since "in these actions, the parties are the same in the sense that each has asked for and has been granted the same relief concerning the same subject matter;" since "the subject matter is precisely the same, being assets and property of the same corporation"; and "since the ground of action, namely, the corporation's inability to pay its debts, is the same", we believe that the instant

case is well within the principle announced in the O'Neil and Foulkrod cases, supra.

Both the above cases have been cited with apparent approval by the Supreme Court, in Lion Bonding Co. v. Karatz, 262 U. S. 77, 86 n. 5. As we have already stated, the same two decisions have been cited with approval by this court, in Mitchell v. Lay, supra. We believe that they correctly state the law.

Since, therefore, the court below and the state court had concurrent and co-ordinate jurisdiction of the subject matter, we hold that, under the rule enunciated in Harkin v. [fol. 133] Brundage, supra, the court below, which first obtained "jurisdiction by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute."

Accordingly, the orders of the court below denying the appellant's motion to annul the order appointing the ancillary receivers, and denying the appellant's motion for a rehearing, should be affirmed.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 7262

E. FORREST MITCHELL, Insurance Commissioner of the State of California, Appellant,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION, Appellees

DECREE—Filed Feb. 26, 1934

Appeal from the District Court of the United States for the Southern District of California, Central Division

[fol. 134] This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Southern District of California, Central Division, and was duly submitted:

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the orders of the said District Court in this cause be, and hereby are affirmed with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged, and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

[File endorsement omitted.]

[fol. 135] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—April 13, 1934

Upon consideration of the petition of appellant, filed March 28, 1934, for a rehearing of above cause, and of the appellees' reply, filed April 4, 1934, and by direction of the court, it is ordered that the said petition be, and hereby is denied.

In United States Circuit Court of Appeals

Order Staying Issuance of Mandate—Filed April 13, 1934

Upon application of Frank L. Guerena, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and [fol. 136] including May 15, 1934; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated: San Francisco, California, April 13, 1934.

[File endorsement omitted.]

[fols. 137 & 138] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 139] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

ORDER STAYING ISSUANCE OF MANDATE—Filed May 11, 1934

Upon application of Frank L. Guerena, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including May 21, 1934; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

Curtis D. Wilbur, United States Circuit Judge.

Dated San Francisco, California, May 11, 1934.

[File endorsement omitted.]

A true copy, attest May, 11, 1934.

Paul P. O'Brien, Clerk. (Seal United States Circuit Court of Appeals, Ninth Circuit.)

[fol. 140] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted, limited to the question of the validity of the appointment of ancillary receivers upon the petition of the primary receivers, and attention is directed to McCandless v. Furlaud, No. 11 on the present docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,676. U. S. Circuit Court of Appeals, Ninth Circuit, Term No. 54. E. Forrest Mitchell, Insurance Commissioner of the State of California, Petitioner, vs. Bertha E. Maurer and International Re-Insurance Corporation. Petition for a writ of certiorari and exhibit thereto. Filed May 21, 1934. File No. 54, O. T., 1934.

FILE COPY

MAY 21 19
CHARLES ELMORE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1933

No. [redacted] 54

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

FRANK L. GUERENA,
Mills Tower, San Francisco,
Attorney for Petitioner.



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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No.

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

The question involved is whether the Federal Court in California or the California State Court first ac-

quired jurisdiction to liquidate and wind up the California business and affairs of appellee International Re-Insurance Corporation, a Delaware company.

Primary receivers were appointed by the State Court of Delaware on April 19, 1933. Appellee Bertha E. Maurer was named complainant and the primary receivers were the petitioners in a bill of complaint filed on the same day against appellee corporation in the United States District Court for the Southern District of California praying that ancillary receivers be appointed to take possession of all property of the company in California and preserve the same until the further order of that Court.

Nine minutes later on the same day appellant E. Forrest Mitchell, as Insurance Commissioner of California, filed in the Superior Court of California a petition alleging the hazardous financial condition of the company and requesting that he be appointed as statutory liquidator, with the powers and duties of an ancillary receiver, pursuant to the direction of the State law affecting the liquidation of insurance companies.

In the District Court and in the Appellate Court appellant contended that the original bill filed in the District Court was so lacking in indispensable jurisdictional averments as to be a legal nullity not conferring upon that Court jurisdiction as a Federal Court or as a Court of Equity, and that, in consequence, the State's proceeding was first instituted and jurisdiction was first acquired by the State Court.

The Appellate Court disposed of that contention by reading into the original bill filed in the District

Court amendments filed on April 25, 1933, holding the bill as amended sufficient to confer jurisdiction upon the District Court, and giving the amendments effect as of the date of the filing of the original bill in the District Court. Opinion upon the alleged insufficiency of the original bill was expressly reserved, and evidently was deemed unnecessary to the decision.

Upon petition for rehearing appellant urged that it was necessary for the Appellate Court to pass upon the original bill in order to determine whether it was a sufficient bill to which the doctrine of relating back the amendments could properly be applied. That petition was denied without opinion.

Therefore a review by this Court is sought.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The original bill of complaint filed in the District Court was a legal nullity, and no bill stating a cause of action or conferring jurisdiction was on file in the Federal Court when the State of California, through the appellant, initiated its proceeding in the State Court on April 19, 1933.

2. The amendments filed in the District Court on April 25, 1933, could not relate back to the time the original bill was filed because the original bill did not state a cause of action or confer jurisdiction, hence there was nothing to amend.

3. The State Court first acquired jurisdiction through the prior filing therein of a petition for the

appointment of appellant as statutory liquidator stating cause for that appointment and therefore conferring jurisdiction upon that Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7262, E. Forrest Mitchell, Insurance Commissioner of the State of California, Intervenor and Appellant, v. Bertha E. Maurer, Complainant and Appellee, International Re-Insurance Corporation, a corporation, Respondent and Appellee, and that the said decree of said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
May 14, 1934.

E. FORREST MITCHELL,
Insurance Commissioner of the State of California,
Petitioner.

FRANK L. GUERENA,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No.

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation),
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 69 Fed. (2d) 233. It is set forth on pages 97-133 of the Transcript of Record.

The orders of the District Court from which appeal was taken were made and entered on May 12, 1933 (T. p. 51) and on June 13, 1933. (T. p. 69.)

The opinion of the Appellate Court was rendered and filed on February 26, 1934 (T. p. 133) and appellant's petition for a rehearing by that Court was denied by order made and filed on April 13, 1934. (T. p. 135.)

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347.

III.

STATEMENT OF THE CASE.

Appellee corporation was organized under the laws of Delaware and was authorized to write workmen's compensation and other classes of insurance in California. On March 30, 1933, appellant suspended the right of that corporation to transact the business of workmen's compensation insurance in California, and that suspension order was not withdrawn. (T. p. 85.)

On April 19, 1933, at 4:45 P. M. a bill of complaint naming appellee Bertha E. Maurer as complainant and naming appellee corporation as respondent was filed in the United States District Court for the Southern District of California alleging that on the same day primary receivers for said corporation had been appointed by order of the Delaware State Court and praying that ancillary receivers be appointed to care for and preserve the property of the corporation in

California pending further order of the Court to which the bill was presented. In that bill the primary receivers appeared in the preamble of the bill and throughout the bill as the petitioners, and the bill was signed by the petitioners and verified in their behalf. The bill was not signed by the complainant. (T. pp. 3-8.)

At an undisclosed hour on April 19, 1933, the District Court signed an order appointing one Keim and one Comstock ancillary co-receivers for appellee corporation. Keim then was and still is one of the three primary receivers. That order also enjoined any interference with the California property of the corporation. The order was filed on April 20, 1933, at 1:50 P. M. (T. pp. 9, 99.)

On April 19, 1933, at 4:54 P. M. appellant filed in the Superior Court of California a petition alleging that appellee corporation was in such condition that the further transaction of business by it in California would be hazardous to its policyholders and creditors, and asking that appellant be appointed to liquidate the California business of the corporation. Upon the filing of that petition the State Court issued a temporary order enjoining the corporation from transacting business or disposing of its property, ordering appellant into the actual possession of the California property and restraining all others from any interference. (T. pp. 86, 98, 99.)

On April 20, 1933, at 9:30 A. M., the temporary restraining order of the State Court, an order to show cause, and appellant's petition were served on appellee corporation. (T. p. 99.)

On April 20, 1933, at an hour subsequent to 9:30 A. M., the order of the District Court was served upon appellee corporation; and on April 21, 1933, that order was served upon appellant. (T. p. 99.)

On April 25, 1933, various amendments were filed to the bill of complaint on file in the District Court (T. pp. 9-39); and on the same date appellee corporation filed its answer to that bill, as amended, admitting all of the allegations thereof and consenting to the appointment of ancillary receivers. (T. pp. 38-39.)

The order to show cause issued by the State Court was returnable on April 28, 1933, but was continued, at appellant's request, in view of the pendency of the proceedings in the District Court. (T. p. 99.)

On May 2, 1933, appellant served and filed in the District Court notice of appellant's motion to vacate the order appointing the ancillary co-receivers, to dissolve the injunction embodied in said order, to dismiss the bill of complaint filed in the District Court, and to re-examine the ex parte order appointing the ancillary co-receivers. (T. p. 45.) That motion was heard and denied by the District Court on May 12, 1933. (T. p. 51.) A motion to rehear said motion was filed by appellant and was entertained and denied by the District Court on June 13, 1933. (T. p. 69.)

Appellant appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the orders on said motions, and the orders were affirmed by the Appellate Court on February 26, 1934. Petition for rehearing was filed by appellant on March

28, 1934, and was denied on April 13, 1934. A stay of the mandate of the Appellate Court was granted pending the filing of this petition for a writ of certiorari. (T. pp. 133-135.)

In the interest of brevity appellant by reference makes part of this statement of the case the "Summary Statement of Matter Involved" in the petition for writ of certiorari presented herewith.

IV.

SPECIFICATION OF ERRORS.

It is claimed by appellant:

1. That the Appellate Court erred in omitting to decide whether the original bill filed in the District Court was a legal nullity, as contended by appellant, or whether it was sufficient to state a cause of action and to confer jurisdiction upon the District Court.

2. That the Appellate Court should have decided that the original bill filed in the District Court was insufficient to state a cause of action or to confer jurisdiction upon that Court as a Federal Court or as a Court of Equity.

3. That the Appellate Court erred in deciding that the amendments filed in the District Court on April 25, 1933, related back to the hour of 4.54 P. M. on April 19, 1933, at which time the original bill was filed.

4. That the Appellate Court erred in deciding that the District Court first acquired jurisdiction through the filing therein of the original bill and the amendments thereto.

V.

ARGUMENT.

THE DISTRICT COURT DID NOT OBTAIN JURISDICTION BY THE PRIOR FILING THEREIN OF THE ORIGINAL BILL BECAUSE THAT BILL DID NOT STATE FACTS SUFFICIENT TO PLEAD A CAUSE OF ACTION OR TO CONFER JURISDICTION.

Examination of the original bill of complaint filed in the District Court reveals not merely technical defects or inartificial pleading but an utter lack of essential jurisdictional averments. The bill set forth no complaint or cause of action of any kind and was a legal nullity which could not operate to confer any jurisdiction upon the District Court.

Appellant therefore contends that the State Court first acquired jurisdiction, within the rule announced by this Court in

Harkin v. Brundage, 276 U. S. 36, 43-44,

through the filing therein of appellant's petition which did state cause for the appointment of appellant as statutory liquidator and did confer jurisdiction upon the State Court.

The original bill of complaint is set forth on pages 3 to 7 of the Transcript of Record. Analysis thereof follows:

(1) The "complainant" in the bill.

In the caption of the bill or petition for appointment of ancillary receivers, appellee Bertha E. Maurer is named as the "complainant", but no reference of any kind is made to her in the body of the bill.

It is not therein disclosed who she was, what was her relation, if any, to appellee corporation or to the

primary receivers characterized as "petitioners" in the bill, whether she was a creditor of appellee corporation and, if so, whether she was a secured or unsecured creditor, or where she resided.

The so-called "complainant" did not sign or verify the bill and did not pray for any relief, nor was the bill signed or verified in her behalf.

(2) The "petitioners" in the bill.

The preamble to the bill describes the bill as the petition of the three primary receivers, but the petitioners are not named as the complainants either in the caption or in the body of the bill. Although the petitioners are not parties to the bill it was the petitioners who prayed for the appointment of ancillary receivers and who expressed their opinion that the appointment of ancillary receivers was "absolutely necessary" for the preservation of the property of appellee corporation and for the protection of its creditors, and it was in their behalf that the bill was signed and verified.

The residence of those petitioners was not pleaded except that it was ascertainable from the verification of the bill that they were not residents of the County of Los Angeles, State of California.

(3) The bill generally.

The bill recites the appointment as primary receivers of the petitioners named therein, but it does not appear whether the appointment was made because of the insolvency of appellee corporation or for some other of the many reasons that may have led to an appointment for general or limited purposes.

The bill did not set forth the nature of the proceeding in which the primary receivers were appointed, expressly stating that the nature of the proceeding would appear to the District Court from an exemplified copy of the bill filed in the Delaware Court which was "being forwarded" to California.

The bill did recite that appellee corporation owned property in California and that certain of its creditors were threatening suits and attachments against that property on overdue obligations, also that appellee corporation would have no valid defense thereto. However, that could not properly be regarded as an allegation of insolvency of appellee corporation or even of an assertion that appellee corporation was in a hazardous financial condition, for those recitals are immediately followed by an allegation that the assets of appellee corporation in Los Angeles were worth about two million dollars "in excess of secured and unsecured debts."

The bill was wholly silent as to the amount in controversy between the "complainant" Bertha E. Maurer and the "respondent" International Re-Insurance Corporation. Indeed, it was not even charged in the bill that there was a controversy between said complainant and said respondent or that said complainant had any complaint or cause of action of any kind against said respondent.

Appellant submits therefore that the District Court did not first obtain jurisdiction on April 19, 1933, because no bill or petition sufficient to confer that jurisdiction was on file in that Court on that day.

To treat such a sham pleading as a bill conferring jurisdiction would prevent another Court from acquir-

ing and exercising jurisdiction through the filing therein of a real bill presenting facts constituting a cause of action and conferring jurisdiction alleged by a vigilant state official moving immediately in the performance of a duty imposed by State law, or alleged by an interested individual alert to protect his rights.

The California statute under which appellant moved forward against appellee corporation almost coincidently with the action of the Delaware Court (Stats. Calif., 1919, p. 265; Stats. Calif., 1921, p. 1017; Act 3739 Deering's General Laws of Calif.) was before this Court in the case of

Lay v. Mitchell, 283 U. S. 864,

in which the Insurance Commissioner of California was appellee and certiorari was denied. Except as amended in 1931 (Stats. of Calif. for 1931, p. 2375), the statute as there set forth was in the same form on April 19, 1933. Those amendments were overlooked by the Appellate Court in its quotations therefrom in this case but the changes are not material here.

The purpose of the California statute to economically and expeditiously liquidate insolvent insurance companies through an administrative agency under Court supervision is now found in the laws of most of the States. It is discussed in connection with similar statutes of the States of New York and Illinois in the cases of

People v. Marquette National Fire Ins. Co., 184 N. E. 800, 808, and

In re Casualty Co. of America, 155 N. E. 735, 244 N. Y. 443,

the former quoting from a report made by the Governor of New York upon that subject in the year 1909 to the General Assembly of that State.

The signs of haste in the preparation of the petition for the appointment of ancillary receivers are otherwise manifest. The petition was verified on April 18, 1933, the day prior to the appointment of the primary receivers. (T. p. 7.) No claim is made by appellees of error in that behalf and presumably that was the true date of verification. On April 18, 1933, the executive committee of the directors of appellee corporation adopted a resolution authorizing the interposition of the corporation's answer to the petition for ancillary receivers filed in the District Court and authorizing acquiescence in the appointment of ancillary receiver. (T. p. 39.) When that alleged authorization was voted the Delaware Court had not determined the insolvency of appellee corporation and had not then acted upon the petition for the appointment of primary receivers therein pending.

The proof of a hurried ex parte application for friendly ancillary receivers, frowned upon by this Court in *Harkin v. Brundage,* supra, is unmistakably clear.

Exemplified copies of the Delaware bill and the Delaware Court order of course could not have been and were not annexed to the bill filed in the District Court for the appointment of ancillary receivers. The District Court could not ascertain from the bill before it on April 19, 1933, what facts were alleged in the Delaware bill and what findings were made in the Delaware Court order. That information was not

acquired by the District Court until the amendments to the bill were filed on April 25, 1933, six days subsequent to the filing of the proceeding instituted by the State of California. Nevertheless the District Court, acting without knowledge of the nature of the Delaware proceeding and in the absence of any showing why ancillary receivers should be appointed, made its ex parte order of appointment expressly predicating it upon the Delaware bill and the Delaware Court order. (T. p. 7.) Not having acquired jurisdiction by the filing of the skeleton bill the District Court had no jurisdiction to exercise, wherefore its order appointing ancillary receivers was a void act.

Closely in point, but not cited by the Appellate Court in this connection, is the decision of the Circuit Court of Appeals for the Third Circuit in the case of

Bluefields S. S. Co. v. Steele, 184 Fed. 584.

It involved an appeal from an order of a Federal Court appointing a receiver ancillary to a primary receiver also appointed by order of a Federal Court; appellant contended that the bill for the appointment of the ancillary receiver did not set forth the essential jurisdictional averments; the disclosures of that bill were exceedingly meager, and neither a copy of the bill nor a copy of the order in the primary receivership accompanied the bill for the appointment of the ancillary receiver. The Appellate Court said:

> "But the court whose aid is invoked must alone determine whether the case is a proper one for the appointment of an ancillary receiver. It cannot act intelligently, and therefore cannot tell what, in comity, it ought to do unless reasonable information has been communicated to it concern-

ing the object which it is requested to aid. It follows that a bill seeking the appointment of an ancillary receiver should disclose the nature of the proceeding in which the receiver was appointed in the court of primary jurisdiction. In the proceeding now before us no affidavits accompanied the bill of complaint except the affidavit of the complainant himself to the effect that he had read the bill, that its contents were true save as to the matters stated on information and belief, and that, as to those matters, he believed them to be true. No copy of the bill of complaint filed in the court of Louisiana, or of the order of that court appointing a receiver there, accompanied the bill filed here.

* * * * * * *

Whether the receiver in Louisiana was appointed because of the insolvency of the Bluefields Company, or for some other reason, we are left to conjecture.

* * * * * * *

The rule (comity) cannot be properly invoked where the essential jurisdictional averments are absent. In the bill before us there are no such averments as would justify the appointment of an ancillary receiver for the limited purpose mentioned in the order, or for any other purpose. While the judgments and decrees of other courts are entitled to full faith and credit, in this case the Circuit Court had before it no judgment or decree of the Louisiana court. It was given no information whatever as to the nature of the proceeding on which the primary receiver was appointed.

* * * * * * *

The bill is fatally defective in not setting forth facts sufficient to justify the appointment of an ancillary receiver."

The Delaware statute under which the primary receivers of appellee corporation were appointed by the Delaware State Court was before this Court in

Pusey & Jones v. Hansen, 261 U. S. 491.

Therein it was held that the Delaware statute authorized the appointment of primary receivers at the instance of a simple contract creditor (Sec. 3883, Revised Code of Del. for 1915); that the statute gave to the State Court the power but not the duty of appointing receivers; that the statute operated to confer upon such a creditor only a remedial right and not a substantive right; that the statute could not enlarge the jurisdiction of the Federal Court; and that the Federal Court could not appoint a receiver at the instance of such a creditor.

Applying that decision to this case it would seem clear that a bill of complaint not alleging that the complainant was a secured creditor, which was true of the bill here in question, would not have conferred jurisdiction upon a District Court in Delaware to appoint a primary receiver, and the necessary corollary would seem to be that a bill insufficient to confer upon a District Court jurisdiction to appoint a primary receiver would be insufficient to confer jurisdiction upon a District Court to appoint a receiver ancillary to a primary receiver appointed by a State Court.

THE AMENDMENTS FILED IN THE DISTRICT COURT ON APRIL 25, 1933, WERE NOT EFFECTIVE AS OF APRIL 19, 1933, THE DATE WHEN THE ORIGINAL BILL WAS THEREIN FILED.

The main point urged by appellant in the Appellate Court was that the original bill did not contain the matter essential to plead any cause of action or to confer jurisdiction upon the District Court as a Federal Court or as a Court of Equity.

The law distinguishes between a bill which pleads a cause of action imperfectly or defectively and a bill which pleads no cause of action at all. In the one case the subject matter of the bill, though inartificially put together, affords a basis for an amendment, but in the latter case there is nothing to which an amendment can relate or attach.

If an amendment does not state a new cause of action, particularly one founded upon facts occurring after the filing of the original bill, the amendment is deemed to relate back to the time of the filing of the original bill. If the amendment is the first or a new statement of a cause of action it dates from the time when it is filed, for in such a situation there is no cause of action already stated and filed to which the amendment can relate back. The cases cited by the Appellate Court on this phase of the appeal do not otherwise state the law—indeed, they appear to so state the law, and appellant now discusses them briefly.

In

Fleischmann Co. v. United States, 270 U. S. 349,

the original declaration, though defective, stated a cause of action, and this Court said that an amend-

ment curing the defects in the original declaration and not stating a new cause of action related back, by operation of law, to the date when the original declaration was filed.

Texas Cement Co. v. McCord, 233 U. S. 157, presented a situation where a suit was prematurely filed and thereafter an amended bill was filed. Of that situation this Court said that there was no cause of action in existence when the original bill was filed, that "there was no cause of action to amend", and that the amendment could not date back to the time of the filing of the original bill. This Court quoted from

American Bonding and Trust Co. v. Gibson County, 145 Fed. 871, 874,

as follows:

> "If no cause of action existed when the suit was started, there was nothing to amend * * *. It was not a case of a cause of action defectively stated. Such a defect is amendable."

Illinois Surety Co. v. Peeler, 240 U. S. 214, also dealt with an original bill defectively pleading but nevertheless pleading a cause of action subject to amendment relating back to the time of the filing of the original bill.

The Appellate Court quotes from

Columbia Valley R. Co. v. Portland & S. Ry. Co., 162 F. 603,

but that case does not treat of an original bill failing to state any cause of action. It is concerned with the filing of a new cause of action through an amended bill, and the Court held that the amended bill, because it stated a new cause of action, did not relate back to the time of the filing of the original bill.

Whether to apply the doctrine of relation back seems to depend not upon whether the additional matter is filed in the form of an amended bill or in the form of amendments to the original bill, which seemed important to the Appellate Court (T. p. 117), but upon the nature and substance of the original bill and the nature and substance of the additional matter without regard to the form in which the additional matter is presented.

Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199,

also cited by the Appellate Court, involved an original bill which was held to state a good cause of action, wherefore the amendment was said to relate back. The same is true of

Hoover Co. v. Sesquicentennial Exposition Assn., 26 Fed. (2d) 821,

in which the Court had before it an original bill stating a cause of action with an "overfullness" which was the point of attack, and the Court said that the "amended bill", a superior product of pleading, spoke as of the date of the filing of the original bill.

The necessity of determining whether an original bill states, perfectly or imperfectly, some cause of action, in considering the application of the doctrine of relation back, also appears from the following authorities:

In

State v. Hackly, 50 So. 772,

it was said:

> "Unless a cause of action is alleged there is no suit and hence nothing to amend."

Tremont Lbr. Co. v. May, 78 So. 650,

declares:

"A petition which does not show a cause of action is one on which no judgment can be pronounced, and is, legally speaking, no petition, and hence cannot be amended. * * *

Where a cause of action is stated for the first time in a supplemental or amended petition, the filing of the supplemental petition must be considered to be the beginning of the suit. The suit must be considered as dating only from such filing, and not from the filing of the original petition; * * *"

In

Terzia v. The Grand Leader, 145 So. 363, 366,

it is said:

"But if it be conceded that an amendment to plaintiff's original petition, which, as we have stated, set out no cause of action, could have been allowed so as to sustain the action, the filing of the amendment would have been the beginning of a new suit which could take effect only from the date of its filing, and would not relate back to the date of filing of the original petition. The rule is stated as follows in 1 C. J. Sec. 413, p. 1159:

'An amended declaration or complaint which does not introduce a new cause of action relates back to the original commencement of the action, and cannot be considered as the beginning of a new action as of the date of the amendment; but where the amendment states a new cause of action, the action is not considered as commenced, as to the new cause until the amended declaration or

complaint is filed. So if the original complaint states a good cause of action, although defectively, an amendment amplifying such statement will relate back; but if no cause of action is stated in the original complaint, an amendment stating for the first time a good cause of action is equivalent to the commencement of a new action as of the date of the amendment.' "

The decisions of the Supreme Court of Louisiana in the *Tremont* and *Terzia* cases are approved and the principles therein announced applied in

Iberville Trust & Savings Bank v. City Cafe, 150 So. 95.

The Supreme Court of Georgia said in

Davis v. Muscogee Mfg. Co., 32 S. E. 30:

"An imperfect cause of action may be made perfect by a suitable amendment. No cause of action whatever cannot, by amendment, be converted into a cause of action."

The Davis decision is approved and followed in:

Hynes v. Evans, 105 S. E. 59:

Shephard v. So. Pine Co. of Ga., 45 S. E. 220;

Turner v. Plottel, 166 S. E. 31.

The rule was also voiced by the Supreme Court of Arkansas in

Arkansas Life Ins. Co. v. American National Life Ins. Co., 161 S. W. 136,

as follows:

"The complaint cannot be amended on motion to make more specific. It is not a statement of a cause of action defectively, but a failure to state a cause of action at all."

To the same effect is

Goodwin v. Robinson, 30 Ark. 436.

In

McCormick v. Kennedy, 56 S. W. (2d) 213,

the Supreme Court of Texas stated that

> "the basis of a plaintiff's cause of action cannot be left to be found in a supplemental petition."

From the cases cited by the Appellate Court in its opinion and from the additional authority hereby presented it seems clear that the Appellate Court should have determined whether the original bill stated a cause of action defectively or whether it failed to state any cause of action. If the original bill stated no cause of action, the amendments, whether they be deemed amendments to the original bill or an amended bill, dated, in legal effect, from the time of their filing and not from the time of the filing of the original bill. Therefore appellant submits that the Appellate Court erred in not deciding whether the original bill stated a cause of action and consequently conferred jurisdiction upon the District Court.

CONCLUSION.

It is therefore respectfully submitted (a) that this case is one calling for the exercise by this Court of its supervisory powers, to the end that the purpose of government to itself liquidate business affected with a public interest shall not be defeated by individuals racing into Court for a friendly, private receivership on a pretended bill of complaint designed to prevent

another Court from exercising jurisdiction which it has obtained at the instance of government diligently pursuing its purpose founded on a generally recognized need of avoiding waste and delay in such liquidation, and (b) that the writ of certiorari should be granted and the decision of the Circuit Court of Appeals reviewed and reversed.

Dated, San Francisco, California,
May 14, 1934.

FRANK L. GUERENA,
Attorney for Petitioner.

FILE COPY

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1934

No. 54

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

FRANK L. GUERENA,
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vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation).

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONER.

This case comes before the Court on writ of certiorari limited to the question of the validity of the appointment by the District Court of the United States for the Southern District of California of ancillary receivers of International Re-Insurance Corporation upon the petition of primary receivers of that corporation appointed by the Court of Chancery of the State of Delaware in and for the County of New Castle.

OPINION BELOW.

The writ was so granted to the United States Circuit Court of Appeals for the Ninth Circuit, and the opinion of that Court is reported in 69 Fed. (2d) 233, and is printed on pages 55-79 of the record.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. A. Sec. 347.

STATEMENT OF THE CASE.

International Re-Insurance Corporation was organized under the laws of Delaware and, prior to April 19, 1933, was authorized to do and doing the business of insurance in California. (R. 1.)

On March 23, 1933, Bertha E. Maurer of New Jersey, having a judgment recovered in that State against a policyholder of Commonwealth Casualty Company of Pennsylvania which theretofore had merged with Independence Indemnity Company of Pennsylvania which, in turn, had theretofore merged with International Re-Insurance Corporation, filed in the Court of Chancery of Delaware in and for the County of New Castle, a bill for the appointment of a receiver of International Re-Insurance Corporation. (R. 13.)

On March 30, 1933, the Insurance Commissioner of California suspended the right of International Re-

Insurance Corporation to transact the business of workmen's compensation insurance in California. That suspension was in effect at all times thereafter. (R. 28, 56.)

International Re-Insurance Corporation defaulted in the Delaware receivership proceeding, and on April 19, 1933, the Delaware Court made its order appointing Arthur G. Logan of Delaware, Carl M. Hansen of Pennsylvania and George deB. Keim of New Jersey as receivers of that company. (R. 19.)

At 4:45 P. M. on April 19, 1933, there was filed in the District Court of the United States in and for the Southern District of California a "Petition for Appointment of Ancillary Receiver" of International Re-Insurance Corporation captioned "Bertha E. Maurer, complainant, v. International Re-Insurance Corporation, a corporation, respondent". (R. 56.)

That petition alleged that the petitioners had been appointed as receivers by the Delaware Court on April 19, 1933; that they had qualified as such receivers; that International Re-Insurance Corporation was a Delaware company transacting the business of insurance in various places, including California, with an office in the City of Los Angeles; that on April 19, 1933, a bill of complaint was filed in the Court of Chancery in and for New Castle County, Delaware, against that company for the purpose of having a receiver appointed; that the nature of the Delaware action was more particularly referred to in the exemplified copy of the bill of complaint in that action which was being forwarded and would be presented to the District Court when received; that petitioners

had been appointed primary receivers simultaneously with the filing of said bill of complaint in Delaware; that the company owned real and personal property in the City of Los Angeles; that petitioners were informed and believed that certain creditors of the company were threatening suits against that property and that attachments were about to be issued or might issue; that there were considerable outstanding and past due obligations of the company; that the petitioners and creditors of the company would sustain irreparable damage if such suits were filed and if attachments issued therein; that in the opinion of the petitioners the property of the company in the City of Los Angeles was worth, in excess of secured and unsecured debts, about two million dollars; that petitioners believed it was necessary for the preservation of that property and for the protection of creditors interested therein that ancillary receivers be appointed by the District Court; and that a certified copy of the order of the Delaware Court appointing petitioners as primary receivers, a certification as to the due approval of their bond as primary receivers, and a certified copy of the answer interposed by the company to the bill of complaint filed in Delaware were being forwarded and would be presented to the District Court when received.

The petition prayed for an order appointing ancillary receivers of all property of the company within the jurisdiction of the District Court to preserve that property until the further order of that Court, for an order directing all persons, including creditors of the company, to deliver all property of the company into

the possession of the ancillary receivers, and for an order enjoining all persons from interfering with that possession.

The petition was verified on April 18, 1933, on information and belief, by one of the attorneys for the petitioners. (R. 56.)

That petition was granted by the District Court without notice or hearing and without any appearance by the company in an order dated April 19, 1933, but filed April 20, 1933, appointing George deB. Keim, one of the primary receivers, and W. H. Comstock as ancillary receivers.

The order of the District Court recited that "upon the bill of complaint" filed in the Delaware action, "upon the certified copy of the order" appointing the primary receivers, "upon the original order appointing such receivers", filed in the Delaware Court, "upon the certificate of the Clerk of said court" of the filing and approval of the bond of the primary receivers, and upon the petition of the primary receivers for the appointment of an ancillary receiver, the two ancillary receivers were appointed "with all rights and powers to carry into force and effect the order of the original court of jurisdiction". The order appointing the ancillary receivers also included the direction for the delivery of possession and the injunction against interference with the possession of the ancillary receivers prayed for in the petition. (R. 4, 5.)

At 4:54 P. M. on April 19, 1933, E. Forrest Mitchell, as Insurance Commissioner of California, acting pur-

suant to the duties devolving upon him by the California Liquidation Act affecting insurance companies,

Act 3739 *Deering's General Laws of California,*
Statutes of Calif. for 1919, p. 265,
Statutes of Calif. for 1921, p. 1017,
Statutes of Calif. for 1931, p. 2375,

which was before this Court in *Mitchell v. Lay,* 48 F. (2d) 79, and which is partly quoted in the opinion of the United States Circuit Court of Appeals in this case, filed a proceeding against International Re-Insurance Corporation in the Superior Court of the State of California in and for the County of Los Angeles alleging that the company was insolvent, and had property and creditors in California, and praying that he be named in his official capacity as ancillary receiver or statutory liquidator to liquidate and wind up the business and affairs of the company in California. (R. 56.)

Upon the filing of the proceeding in the State Court, that Court issued its order temporarily restraining the company from transacting business and from disposing of its property and ordering the Insurance Commissioner into the actual possession of the company's property. That order included an order to show cause which was served upon the company during the morning of April 20, 1933. (R. 56, 57.)

The order of the District Court was served on the company during the afternoon of April 20, 1933, and was served on the State Insurance Commissioner during the morning of April 21, 1933. (R. 57.)

On April 25, 1933, the petitioning primary receivers filed with the District Court various amend-

ments to their "petition for the appointment of ancillary receiver" characterized as a bill of complaint, which included exemplified copies of the documents in the Delaware action referred to in the original petition for the appointment of ancillary receiver and there said to be en route for the purpose of filing in the District Court. (R. 5.)

On April 25, 1933, International Re-Insurance Corporation filed in the District Court its answer to the "bill of complaint" of the petitioning primary receivers, admitting all of the allegations of that petition, affirmatively asking the District Court to appoint an ancillary receiver or receivers to take possession of the company's property in that jurisdiction, and explaining that the filing of that consent answer had been authorized by resolution of the Executive Committee of the Board of Directors of the company adopted on April 18, 1933, the day before the primary receivers were appointed. (R. 24.)

On May 2, 1933, the State Insurance Commissioner filed in the District Court a motion to vacate the order appointing the ancillary receivers, alleging that the Court had no jurisdiction to make the appointment, that the petition was wanting in equity and did not justify the appointment of ancillary receivers, and that the order of appointment was not a valid order. The motion was denied. A motion was thereupon filed for a rehearing of the motion to vacate and, though entertained, was also denied. (R. 25, 31, 44.) Appeal to the United States Circuit Court of Appeals was then taken from the orders upon those motions. (R. 45-47.)

The United States Circuit Court of Appeals upheld the orders of the District Court on the motions to vacate and denied a petition for rehearing. Application was then made to this Court for certiorari. (R. 55, 80.)

SPECIFICATION OF ERRORS.

It is claimed by petitioner herein:

1. That the Appellate Court erred in deciding that the District Court had jurisdiction to appoint ancillary receivers upon the petition of the primary receivers.

2. That the Appellate Court should have decided that the petition of the primary receivers for the appointment of ancillary receivers was lacking in essential jurisdictional averments and that it was insufficient to confer jurisdiction upon the District Court to appoint ancillary receivers.

3. That the Appellate Court erred in deciding that the District Court first acquired jurisdiction through the filing of the petition of the primary receivers for the appointment of ancillary receivers.

4. That the Appellate Court erred in not deciding that said petition for the appointment of ancillary receivers was a legal nullity and that therefore the California State Court first acquired jurisdiction by the proceeding therein filed by the State of California, through its Insurance Commissioner, on April 19, 1933.

ARGUMENT.

I.

A FEDERAL COURT OF A FOREIGN JURISDICTION DOES NOT HAVE JURISDICTION TO APPOINT ANCILLARY RECEIVERS ON THE PETITION OF THE PRIMARY RECEIVERS.

(a) The decision of the Appellate Court in this case.

The Appellate Court pointed out that under the general rule announced by this Court in *Booth v. Clark,* 58 U. S. 338, a receiver in equity has no right to sue in Courts of a foreign jurisdiction. Evidently in building toward its subsequent statement that the purpose of the requested appointment of ancillary receivers was not to remove property from California, the Appellate Court observed that the rule of *Booth v. Clark* is confined to a case where the purpose of the primary receiver is to remove property from a foreign jurisdiction, citing *Great Western Mining Co. v. Harris,* 198 U. S. 561, and *Sterrett v. Second National Bank,* 248 U. S. 73.

A reading of those cases to us seems to compel the conclusion that the rule of *Booth v. Clark* rests upon many considerations—that an ordinary chancery receiver, having only the authority arising from his appointment as such, has no legal status extraterritorially; that the Court appointing him has no extraterritorial jurisdiction; that the foreign jurisdiction has the right and power to determine for itself whether an ancillary receiver shall be appointed and who the ancillary receiver shall be; and that there shall be such disposition of property in the foreign jurisdiction as will protect and not prejudice creditors interested therein.

The *Great Western Mining* case but follows and applies the principle enunciated in *Booth v. Clark.* The *Sterrett* case does likewise but establishes, as do *Oakes v. Lake,* 290 U. S. 59, and *Clark v. Williard,* 78 L. Ed. 743, an exception to that rule when the primary receiver is vested by conveyance or statute with the status of title-holder, quasi-assignee, successor to the insolvent corporation, or charter liquidator. In the *Sterrett* decision it is said that the rule of *Booth v. Clark* "permits an application for an ancillary receivership" in a foreign jurisdiction, but it is not said that the primary receiver may so apply. It does not say what status he must have and disclose if he may apply, and no comment is made as to the Court in which the application may be made or as to the averments necessary to the application.

"Specific recognition" for the Appellate Court view is said by that Court to exist in *Ward v. Foulkrod,* 264 Fed. 627. The subject of that case was an insolvent Delaware corporation for which two main receivers had been appointed, one by a State Court in Delaware and the other by a Federal District Court in Pennsylvania. The State Court proceeding was first filed and under the rule of this Court laid down in *Harkin v. Brundage,* 276 U. S. 36, the State Court first acquired jurisdiction to liquidate the affairs of the company. The State Court receiver filed a petition in the Pennsylvania Federal Court to summarily oust the Federal receiver. The petition was denied without prejudice, the Court saying that the State Court receiver could "institute appropriate proceedings for the appointment of ancillary receivers", for

the property of the company in the hands of the Federal receiver in Pennsylvania. That was not a declaration that the Federal Court in Pennsylvania through the filing therein of a mere request by the Delaware receiver for the appointment of ancillary receivers in Pennsylvania would have had jurisdiction to make the requested appointment. No mention was there made, and the Appellate Court decision in this case is likewise silent upon the point, of the fact that Section 3884 of the Revised Statutes of Delaware invests a receiver of a Delaware corporation appointed by a Delaware State Court with title to personal property of the corporation wherever situated.

Such was the status of the Delaware receiver in the *Ward* case but an equally important circumstance, absent from this case, was the existence of two main, independent, antagonistic receivership proceedings involving an actual controversy and presenting an impossible situation from an administrative viewpoint. Obviously it was necessary, through appropriate proceedings, that the hand of the Federal receiver be stayed, otherwise the rule of first acquired jurisdiction would be meaningless and its purpose defeated. But the Appellate Court in this case was not concerned with any such situation.

The conclusion of the Appellate Court as to jurisdiction is also grounded upon the cases of *Rust v. United Water Works Co.*, 70 Fed. 129, and *Seested v. Bonfils*, 33 Fed. (2d) 185.

In the *Rust* case a receiver of American Water Works Company appointed by a State Court in New

Jersey intervened in a proceeding pending against that company in the Federal Court in Colorado seeking leave to vacate a judgment there improperly obtained against that company and to interpose defenses against the judgment creditor. The receiver, under the New Jersey law, had the status of charter successor and trustee for the creditors and stockholders of the judgment debtor. More than that, the receiver's petition to intervene and to be appointed ancillary receiver disclosed an actual, pending controversy in which the receiver was an aggrieved party, and was accompanied by exemplified copies of the New Jersey Court proceedings which were presented to the Colorado Court and which were before the latter when the latter's jurisdiction was invoked and exercised.

It is not clear from the opinion in the *Seested* case whether the primary receiver, appointed by a State Court in Missouri, was directly petitioning the Federal Court in Colorado for the appointment of an ancillary receiver or whether the application was made by a creditor. Counsel for petitioner in *McCandless v. Furlaud,* under submission in this Court, interpret the opinion as dealing with an application by the primary receiver, but counsel for respondents therein contend with equal conviction that creditors were the petitioners in the Colorado Court. The statement of facts in the opinion, and the title of the case, indicate that the petitioners for the appointment of the ancillary receiver were Frank C. Seested and Florence Gaskins, both judgment creditors, although the reasoning of the Court appears to have been upon the

assumption that the request for the appointment of the ancillary receiver was made by the primary receiver. In any event, there is no independent reasoning and the decision on the point is wholly predicated upon the Rust and other cases herein considered.

(b) The claim of jurisdiction made by petitioner in McCandless v. Furland.

From the Appellate Court opinion in that case it appears that McCandless is an ordinary chancery receiver of Duquesne Gas Corporation appointed by a Federal Court in Pennsylvania and that upon his petition for an ancillary receiver, accompanied by the full record of the Pennsylvania proceeding, a Federal Court in New York appointed an ancillary receiver. The petitioner in the *McCandless* case, defending the jurisdiction of the New York Court, cites several cases to which we shall briefly refer.

Coal & Iron Ry. Co. v. Reherd, 204 Fed. 859, presented a case of a primary receiver appointed in Virginia who brought suit as receiver in West Virginia prior to his appointment as ancillary receiver on a petition for the appointment of an ancillary receiver not filed by the primary receiver but by complainants against the corporation in receivership.

Shinney v. North American Savings L. & B. Co., 97 Fed. 9, is a case of the appointment in Minnesota of a primary receiver of a Minnesota corporation against which there was pending in a Federal Court in Utah a suit in which the company appeared after service of process and in which the Minnesota re-

ceiver filed a petition asking that he be appointed ancillary receiver. The opinion does not disclose any contention to the effect that the Utah Court was without jurisdiction to appoint an ancillary receiver at the instance of the primary receiver.

Bluefields S. S. Co. v. Steele, 184 Fed. 584, was concerned with the appointment of an ancillary receiver made by a creditor of the company in receivership.

Walker v. U. S. Lighting & Heating Co., 220 Fed. 393, was also a case where a creditor sought the appointment of an ancillary receiver.

McCandless also relies on *Platt v. Philadelphia & R. R. Co., et al.,* 54 Fed. 569, which seems to hold, qualifiedly, that a Federal Court may appoint an ancillary receiver upon the ex parte application of a foreign chancery receiver. However, it is not entirely clear whether the primary receiver was the applicant. The decision seems to be at most conditional authority for the ex parte appointment of an ancillary receiver based upon a past practice which the Court said it would fully consider upon motion to annul the order appointing the ancillary receiver.

Bernheimer v. Converse, 206 U. S. 516, and *Converse v. Hamilton,* 224 U. S. 243, declare the right of a primary receiver having a status of quasi-assignee to sue in a foreign jurisdiction but they do not bear upon the issue under discussion, nor does *Grant v. Leach & Co.,* 280 U. S. 351.

(c) The reasons for lack of jurisdiction to appoint the ancillary receivers.

Sections 1 and 2 of Article III of the Constitution define the scope of the "judicial power" of the United States. In their relation to this case that power is confined to "controversies" between citizens of two or more states.

Section 24 of the Judicial Code (28 U. S. C. A. Sec. 41), conformably to that limitation, provides that the District Courts shall have original jurisdiction of "suits" where the "matter in controversy" exceeds a prescribed amount and "is between citizens of different states".

The term "controversy" is explained in *Marbury v. Madison,* 1 Cranch 137, cited in *Muskrat v. United States,* 219 U. S. 346,

> "to be a suit instituted according to the regular course of judicial procedure."

In the *Marbury* case it is also said that the term "implies the existence of present or possible adverse parties, whose contentions are submitted to the Court for adjudication". Quoting from the pronouncement of this Court in *Osborn v. Bank of United States,* 9 Wheat. 738, it was further said that the judicial power of the United States "is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law".

It therefore appears essential to the exercise by a District Court of the United States of its carefully prescribed jurisdiction that there be a complainant before that Court asserting rights against an-

other, that there be a suit instituted or pending in that Court, and that there be an actual controversy submitted to that Court. Support for these conclusions is found in:

Mercantile Trust Co. v. Kanawaha & O. Ry. Co., 39 Fed. 337;
In re Brant, 96 Fed. 257;
Sullivan v. Swain, 96 Fed. 259;
Greene v. Star Cash etc. Co., 99 Fed. 656.

The *Mercantile* and *Brant* cases were cited approvingly in *Fairview Floor, Spar & Lead Co. v. Ulrich*, 192 Fed. 894, which, however, involved the application by a creditor for the appointment of an ancillary receiver in the form of a mere petition to which were attached complete copies of the records in the primary receivership proceeding.

The reasoning in the group of cases just cited is that the Federal Court invoked lack of jurisdiction because no independent suit was there pending, because the petitioner was not an aggrieved party, and because there was no controversy between adverse parties. It was said that to uphold the appointment of the ancillary receiver under such circumstances would mean that the jurisdiction of a District Court of the United States could be enlarged otherwise than by congressional action.

The presentation under this head is directed to a mere request or petition to a Federal Court for the appointment of ancillary receivers which does not contain the essentials of a bill of complaint filed by an aggrieved complainant involved in an actual con-

troversy over the subject of the bill. From the authorities discussed it would seem to follow that a Federal Court in a foreign jurisdiction is without power to appoint an ancillary receiver upon the application of a primary receiver unless the latter has an authority and status beyond that of an ordinary chancery receiver which follows him into the foreign jurisdiction, where it is recognized, and unless the application is at least the legal equivalent, regardless of its label, of a bill of complaint in which the applicant is an aggrieved complainant involved in an actual controversy over the subject of the application.

Apart from the status of the primary receiver, the test of the validity of the appointment of an ancillary receiver by a Federal Court in a foreign jurisdiction at the instance of the primary receiver is the power of the Federal Court. Counsel for petitioner in the *McCandless* case stress the principle of comity. But this Court has declared that "comity is not a rule of law but one of practice, convenience and expediency".

Mast Foos & Co. v. Stover Mfg. Co., 177 U. S. 488.

Comity, therefore, cannot endow a primary receiver with authority not granted by the law of the sovereignty in which he has been appointed, and it cannot confer upon a Federal Court jurisdiction with which it is not vested by the Constitution and the Congress. Nor can the consent of an insolvent corporation to the appointment of a primary receiver or to the appointment of an ancillary receiver have

such effect upon the status of the primary receiver or upon the jurisdiction of a Federal Court to appoint the ancillary receiver.

Gatch v. Mobile R. Co., 59 Fed. (2d) 217.

Some of the authorities we have considered mention the full faith and credit clause but this Court has said that Section 1 of Article IV of the Constitution has no greater dignity than other provisions of our organic law. Therefore, it cannot be properly said that by virtue of the full faith and credit clause alone a Federal Court in a foreign jurisdiction has power to appoint an ancillary receiver.

Old Wayne Mutual L. Assn. v. McDonough, 51 L. Ed. 345.

No legal significance attaches to the argument, made in the *McCandless* case, that creditors of an insolvent residing in the foreign jurisdiction could be as well protected by the administration of an ancillary receiver appointed by a Federal Court in that jurisdiction whether appointed upon the petition of a primary receiver or otherwise, for the question still remains one of the power and jurisdiction of the Federal Court. Counsel for petitioner in the *McCandless* case emphasize the interest of the primary receiver in a self-directed or controlled ancillary administration although it is conceded that the rule of procedure and receivership practice is for the ancillary receiver to cooperate and coordinate with the primary receiver to the fullest extent possible under the law and consistent with the rights of creditors in the ancillary jurisdiction. Indeed, the

primary receiver, the defendant corporation and the local creditors are said to have the only direct interest in the appointment of an ancillary receiver, but counsel seems to overlook the fact that in practically every State of the Union there is statutory provision for the appointment of primary and ancillary receivers of insolvent insurance companies at the instance of the State itself, evidencing a well established public policy and purpose to avoid the extravagance and delay so frequently incident to friendly, hurried, *ex parte,* private receiverships upon which this Court has frowned.

Harkin v. Brundage, supra;
Shapiro v. Wilgus, 287 U. S. 348.

The petitioning primary receiver in the *McCandless* case seems to believe that the failure of a creditor in the foreign jurisdiction to there seek by appropriate proceeding the appointment of an ancillary receiver or the inability of the primary receiver to locate a creditor in the foreign jurisdiction who could be spurred into making that application would present a dilemma, although it is the fact that the State of New York, notably, and nearly every other State has official agencies authorized and directed by State law to liquidate and wind up the affairs of insolvent insurers.

In making these observations we do not contend that the administration of the affairs of a defunct insurance carrier must be conducted in State Courts under State auspices to the exclusion of the Federal Courts. We stand on the ground that the issue here

is wholly one of the power and jurisdiction of the Federal Court. If the doors of the Federal Court in New York should not have opened to McCandless in his case or to any primary receiver in any case where there is no party aggrieved involved in an actual controversy suing for the appointment of an ancillary receiver by the Federal Court in a foreign jurisdiction, that would seem to be an argument more properly addressed to the Congress.

II.

THE DISTRICT COURT BELOW DID NOT HAVE JURISDICTION TO APPOINT THE ANCILLARY RECEIVERS.

Whatever the law may be upon the issue which this Court has elected to consider, we submit that the petition for the appointment of an ancillary receiver filed in the District Court below on April 19, 1933, was utterly inadequate as a bill of complaint stating a cause of action, if that is a requisite, or as a sufficient petition, assuming that an ancillary receiver may be appointed through the medium of a proper petition.

Obviously, the so-called "petition" was not a bill of complaint in the true sense and did not initiate a suit by an aggrieved party with respect to an actual controversy. Regarded as a petition or as a bill of complaint it did not advise the District Court of the reason why the primary receivers had been appointed, of the nature of their duties, or of the need for the appointment of an ancillary receiver. The Delaware receivers might have been appointed for a very limited

purpose but whether they were specially or generally appointed could not be ascertained from the document filed with the District Court. The petition frankly stated that the "nature of the cause of action" in Delaware would appear to the District Court upon the examination of the records in the Delaware action, but that explanation and information were not before the District Court when it made the order appointing the ancillary receivers.

The petition asked the District Court to order creditors of the insolvent to surrender to the ancillary receivers property of the insolvent in the possession of those creditors without notice to them or opportunity to be heard upon such claims as they may have had to continued and undisturbed possession. The petition sought an injunction against any and all interference with the anticipated possession of the property of the insolvent by the ancillary receivers without notice to the company, to the State Insurance Commissioner charged by law with the supervision of the affairs of the company in California, to California creditors of the company or to any one else who might be interested. No order to show cause was issued or made returnable on the application for that injunction.

Not even the meager recitals of the petition were definitely represented to the District Court as true, for one of the attorneys for the petitioners, verifying the petition, swore that he believed the recitals to be true. That caution is understandable in view of the fact that the verification occurred on April 18, 1933,

the day before the Delaware Court made its order appointing the primary receivers.

Bluefields S. S. Co. v. Steele, supra, squarely supports our contention that as a petition or as a bill the application for the appointment of an ancillary receiver submitted to the District Court was fatally defective to confer jurisdiction to grant the application.

> "But the court whose aid is invoked must alone determine whether the case is a proper one for the appointment of an ancillary receiver. It cannot act intelligently, and therefore cannot tell what, in comity, it ought to do unless reasonable information has been communicated to it concerning the object which it is requested to aid. It follows that a bill seeking the appointment of an ancillary receiver should disclose the nature of the proceeding in which the receiver was appointed in the court of primary jurisdiction. In the proceeding now before us no affidavits accompanied the bill of complaint except the affidavit of the complainant himself to the effect that he had read the bill, that its contents were true save as to the matters stated on information and belief, and that, as to those matters, he believed them to be true. No copy of the bill of complaint filed in the court of Louisiana, or of the order of that court appointing a receiver there, accompanied the bill filed here.
>
> * * * * * * *
>
> Whether the receiver in Louisiana was appointed because of the insolvency of the Bluefields Company, or for some other reason, we are left to conjecture.
>
> * * * * * * *

> The rule (comity) cannot be properly invoked where the essential jurisdictional averments are absent. In the bill before us there are no such averments as would justify the appointment of an ancillary receiver for the limited purpose mentioned in the order, or for any other purpose. While the judgment and decrees of other courts are entitled to full faith and credit, in this case the Circuit Court had before it no judgment or decree of the Louisiana court. It was given no information whatever as to the nature of the proceedings on which the primary receiver was appointed.
>
> * * * * * * *
>
> The bill is fatally defective in not setting forth facts sufficient to justify the appointment of an ancillary receiver."

The District Court must have realized that it could not act knowingly upon the petition, that it could not tell what, in comity or otherwise, it ought to do, that it had no reasonable information concerning the object which it was requested to aid, and that it could not determine whether the granting of the application would protect or prejudice the California creditors of the company, or whether the purpose of the appointment was to remove property of the company from California.

The limitations imposed upon the filing of suits by primary receivers in foreign jurisdictions and upon the jurisdiction of Federal Courts are designed to permit and make necessary an inquiry into those very matters as to which the District Court in this case had no knowledge or information.

Proof of that realization stands out in the order of the District Court appointing the ancillary receivers in the declaration that the petition was granted upon the records of the Delaware action none of which was at that time before the District Court. That order directed the ancillary receivers to carry into force and effect the order of the Delaware Court although the nature of that order was not known to the District Court. That order commanded all creditors of the company to deliver to the ancillary receivers all property of every kind belonging to the company regardless of their claims thereto and without any prior notice to them. The sweeping injunction prayed for in the petition was likewise granted in that order without notice or hearing to any one affected thereby.

CONCLUSION.

Wherefore, petitioner respectfully submits that the appointment of the ancillary receivers by the District Court was without jurisdiction and void and that the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be reversed with costs here and in the Court below.

Dated, San Francisco, California,
November 2, 1934.

Respectfully submitted,
FRANK L. GUERENA,
Attorney for Petitioner.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1933.

No. 1073.

E. Forrest Mitchell, Insurance Commissioner of the State of California,
Petitioner,

vs.

Bertha E. Maurer and International Re-Insurance Corporation, a corporation,
Respondents.

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

With the additions herein noted, we concur in the statement of the case contained in petitioner's Petition for Writ of Certiorari and Brief in support thereof (pp. 6-9).

Respondent International Re-Insurance Corporation is a corporation organized and existing under the laws of Delaware, and, prior to April 19th, 1933, conducted an insurance business in practically every state of the United

States, including California. [R. p. 4.] On April 19th, 1933, in an action brought by a creditor for the appointment of general receivers in the Court of Chancery in the State of Delaware, in and for New Castle County, entitled "Bertha E. Maurer, Plaintiff, vs. International Re-Insurance Corporation, a corporation, Respondent," Arthur G. Logan of Wilmington, Delaware, Carl M. Hansen of Philadelphia, Pennsylvania, and George DeB. Keim of Edgewater Park, New Jersey, were appointed receivers for all of the property and assets of said International Re-Insurance Corporation. [R. pp. 30-36.] Subsequent to their appointment, but on the same day, to-wit, April 19th, 1933, Arthur G. Logan, Carl M. Hansen and George DeB. Keim, as primary receivers of respondent corporation in the State of Delaware, filed, in the District Court of the United States for the Southern District of California, the petition for the appointment of ancillary receivers, referred to in petitioner's brief (p. 6). The caption of this petition or bill of complaint was "Bertha E. Maurer, Plaintiff, vs. International Re-Insurance Corporation, Respondent." [R. p. 3.] This was the identical caption of the bill for the appointment of primary receivers filed in the Delaware court. [R. p. 20.] To the extent that the petitioners were revealed in the body of the bill to be the primary receivers, and not the complainant designated in the caption, a discrepancy existed between the caption and the body of the bill. We shall comment in our argument upon the significance which petitioner endeavors to attach to this fact. However, it clearly appears from the bill who the petitioners were and what their status was. It was alleged that the petitioners had been appointed receivers for International Re-Insur-

ance Corporation in the Delaware proceedings, which proceedings had been brought for the purpose of having receivers appointed for all of the property and assets of the corporation wherever situated. [R. p. 4.] It was further alleged that the corporation owned property and assets in the City of Los Angeles, State of California, that the petitioners were informed and believed that certain creditors of the corporation were threatening suits and attachments against the property of the corporation, that the corporation had no defense to these threatened suits, and that if such attachments were levied, irreparable damage would be the result to the creditors of the corporation and to the primary receivership. [R. p. 5.] Specific reference was made to the bill filed in the Delaware proceedings and the order made thereon. [R. p. 4.] The bill prayed that receivers be appointed by the District Court ancillary to the primary proceedings in the State of Delaware.

As stated in petitioner's brief (p. 8), on April 25th, 1933, with leave of court [R. p. 37], amendments to this bill were filed in the District Court. By these amendments there were added to the original bill and made a part thereof, exemplified copies of the Bill for Appointment of Receivers filed in the Court of Chancery, State of Delaware [R. pp. 20-25] and the order appointing primary receivers in that court [R. pp. 30-36]. The answer of respondent International Re-Insurance Corporation, which is also mentioned in petitioner's brief (p. 8), was filed subsequent to the filing of these amendments. [R. pp. 38-39.]

The petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the orders

of the District Court denying his motion to vacate the receivership, and denying his motion for rehearing of the original motion. Without deciding as to whether the original bill was sufficient, the court below held that the amendments related back to the time of the original filing, and, as the original bill was filed in the District Court before the filing of the action by the petitioner in the State Court, that the District Court acquired prior jurisdiction.

The petitioner seeks a writ of certiorari from this court upon the sole ground that the Circuit Court of Appeals erred in not holding that the bill, as amended, did not date from the time of filing the original bill, but only from the time of the filing of the amendments, and that, since the proceeding in the State Court was filed prior to the time of the filing of the amendments in the District Court, although subsequent to the filing of the original bill in that court, the State Court thereby acquired prior jurisdiction.

As a necessary premise to his argument upon this point, petitioner in his brief (pp. 10-17) seeks to maintain that the original bill filed in the District Court not only insufficiently alleged a cause of action for the appointment of ancillary receivers, but was a complete nullity, so that the amendments thereto could not relate back to the time of filing of the original bill and that the court below should have so held.

We shall discuss these two points in the order in which they appear in petitioner's brief.

II.

ARGUMENT.

SUMMARY OF RESPONDENTS' ARGUMENT.

POINT A.

THE ORIGINAL BILL OF COMPLAINT ALLEGED A CAUSE OF ACTION FOR THE APPOINTMENT OF ANCILLARY RECEIVERS.

POINT B.

THE BILL OF COMPLAINT, AS AMENDED, WAS EFFECTIVE AS OF THE TIME OF FILING THE ORIGINAL BILL.

POINT A.

The Original Bill of Complaint Alleged a Cause of Action for the Appointment of Ancillary Receivers.

The petitioner concedes that the Bill of Complaint, as amended, alleged a cause of action for the appointment of ancillary receivers by the District Court and that the District Court had jurisdiction to make the appointment on the amended bill. His argument is that the original Bill of Complaint was entirely nugatory, so that amendments thereto could not relate back to the time of the filing of the original bill. To support his contention in this regard, he specifies in his brief (pp. 10-17) six objections to the original Bill of Complaint.

The first objection which petitioner raises has already been adverted to in our statement of the case, to the effect that the caption of the bill was identical with that of the

proceeding in the State Court of Delaware, in which Bertha E. Maurer was the complainant, whereas the actual petitioners in the proceeding filed in the District Court in California were the primary receivers who had been appointed in the Delaware proceedings. It is true that the original attorneys who filed the proceedings in the District Court apparently deemed the caption of the Delaware proceeding to be the proper caption for the ancillary proceeding in the District Court of California. Justification for this procedure appears in the case of *Bluefields S. S. Co. v. Steele,* 184 Fed. 584, 587. However, whether or not the caption of the bill was technnically correct, the body of the bill clearly alleged a cause of action on the part of the primary receivers for the appointment of ancillary receivers by the District Court. The bill placed before the court the fact that proceedings for the appointment of primary receivers had been instituted in the State of Delaware, the state of incorporation of the respondent corporation, that primary receivers had been appointed upon that petition, and that the primary receivers were the petitioners in the proceeding before the District Court. The bill, therefore, established beyond cavil that the primary receivers were the petitioners, and any discrepancy resulting from the use of the caption of the proceedings in Delaware constituted, at most, a trivial, technical defect in the bill which had no bearing whatsoever upon the question as to whether or not a bill of complaint for the appointment of ancillary receivers had actually been filed on April 19th, 1933.

The next three objections, raised by the petitioner in his brief (pp. 11-12), are that the Bill of Complaint failed to allege the jurisdictional amount and diversity of citizen-

ship between the parties, conferring upon the District Court jurisdiction, and that the bill contained no allegations of insolvency. The petitioner cites no authority to support his assumption that allegations of jurisdictional amount, diversity of citizenship and insolvency are necessary to sustain an action for the appointment by a Federal Court of receivers ancillary to a primary proceeding. This omission is understandable in view of the fact that it has been repeatedly held that a Federal Court has jurisdiction to appoint receivers ancillary to a receivership proceeding in another jurisdiction upon the ground of comity and without regard to allegations of insolvency or the usual requisites of jurisdictional amount and diversity of citizenship.

Sands v. E. S. Greeley & Co., 88 Fed. 130 (C. C. A., Second Circuit);

Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9 (C. C. D., Utah);

Rust v. United Waterworks Co., 70 Fed. 129 (C. C. A., Eighth Circuit);

Bluefields S. S. Co. v. Steele, 184 Fed. 584 (C. C. A., Third Circuit);

Ward v. Foulkrod, 264 Fed. 627 (C. C. A., Third Circuit);

Bluefields S. S. Co. v. Steele, 192 Fed. 23 (C. C. A., Third Circuit);

Seested v. Bonfils, 33 F. (2d) 185 (D. C. D., Colo.);

Trustees System Co. of Pennsylvania v. Payne, 65 F. (2d) 103 (C. C. A., Third Circuit);

Walker v. United States Light & Heating Co., 220 Fed. 393 (D. C. S. D. N. Y.);

Reed v. Alaska Mines Corporation, 6 Alaska 370.

The same principle has been applied in the State Courts where, under the doctrine of comity, one court will appoint receivers ancillary to receivership proceedings in another state, without regard to the question of jurisdiction.

Southern Colonization Co. v. Parten, 83 Fla. 300, 91 So. 263;

Bodge v. Skinner Packing Co., 115 Neb. 41, 211 N. W. 203.

Federal Courts will make such ancillary appointment not only when based upon proceedings in other Federal Courts, but also when based upon primary proceedings in a State Court.

Sands v. E. S. Greeley & Co., 88 Fed. 130;

Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9;

Rust v. United Waterworks Co., 70 Fed. 129;

Seested v. Bonfils, 33 F. (2d) 185.

The case of *Sands v. E. S. Greeley & Co.,* 88 Fed. 130, is representative of the principle applied in the cases above cited. There a receiver was appointed in a State Court in Connecticut. He then instituted proceedings in a Federal District Court in New York for his appointment as a receiver ancillary to the proceedings in Connecticut. He alleged, as grounds for appointment, his appointment in the primary proceedings. After discussing the powers of a primary receiver, the court said (pp. 132-133):

"When the administration extends over assets located in several jurisdictions, it is often convenient to apply, in advance, for the assistance of the differ-

ent courts; hence the practice has become common of applying for auxiliary or ancillary appointments. When such an application is made, the court to which it is addressed exercises its own original jurisdiction. The decree in the court of the domicile of the corporation is evidence in every other state that the corporation is insolvent, and that a proper case exists in that state for the appointment of a receiver, and it is to be respected accordingly, in obedience to the constitutional provision whereby full faith and credit is to be given in each state to the records and judicial proceedings of every other state of the Union. * * * Ordinarily, in comity to the proceeding of another court of co-ordinate jurisdiction, it will appoint an ancillary receiver, and assume administration in aid of the primary receiver."

The fifth objection, appearing intermittently in petitioner's brief (pp. 11, 12, 14-16), is that the original bill failed to set forth the nature of the proceedings in which the primary receivers were appointed. In this connection he states in his brief (p. 12): "The bill did not set forth the nature of the proceeding in which the primary receivers were appointed." The petitioner errs in this statement. The Bill of Complaint, as originally filed, alleged [R. p. 4] that the petitioners therein had been appointed primary receivers in a proceeding brought in the Court of Chancery in the State of Delaware "for the purpose of having a receiver or receivers appointed of all and singular the property and assets of every nature and wheresoever situated of the respondent" corporation. It thus appears that the nature of the proceeding in the Delaware Court was clearly alleged. As stated in the case of *Sands*

v. E. S. Greeley & Co., 88 Fed. 130, in the language above quoted, an allegation of insolvency was unnecessary since the allegation that the Delaware Court had entered an order appointing primary receivers was the essential allegation upon which the District Court in California might determine whether or not ancillary receivers should be appointed.

Petitioner seeks to rely upon the case of *Bluefields S. S. Co. v. Steele,* 184 Fed. 584, in support of this phase of his attack upon the sufficiency of the original bill. The language, quoted by petitioner in his brief (pp. 15-16) from the opinion in that case, does not support petitioner's contention when read in conjunction with the entire opinion and the facts involved. There the complainant brought an action in a Federal Court in Pennsylvania, seeking to have ancillary receivers of the defendant corporation appointed for the sole purpose of prosecuting an action against a third party which the complainant alleged the defendant refused to prosecute. The bill alleged that a suit had been filed in a Federal District Court in Louisiana "on account of the various matters and things set up in said bill"; that in said bill there was a prayer for the appointment of a receiver; and that pursuant to this prayer a receiver had been appointed. The bill in the Pennsylvania proceedings contained no other allegations regarding the nature or purpose of the suit in Louisiana. In reversing the order of the Pennsylvania District Court appointing receivers, the Circuit Court of Appeals for the Third Circuit held that, since the nature and purpose of the Louisiana proceedings had not been alleged and it could not be determined whether the receiver appointed in Louisiana was a general receiver or a mere custodian for

the property involved in the action, sufficient facts had not been alleged for the court to determine the propriety of an ancillary receivership. The inapplicability of the decision to the facts in the instant case is apparent, in view of the fact that the original Bill of Complaint filed in the District Court alleged that an action had been brought in Delaware for the appointment of receivers for all of the property and assets of the corporation, a specific allegation of a general liquidation receivership, as contrasted with a receivership for the custody of specific property involved in litigation.

The final objection made in petitioner's brief (p. 17) is that since the bill failed to allege that the complainant was a secured creditor, the District Court had no jurisdiction to appoint the ancillary receivers, relying in support of this contention on the case of *Pusey & Jones Co. v. Hanssen,* 261 U. S. 491, 67 L. ed. 763. In that case this court held that a Delaware statute, permitting a receivership at the instance of a simple contract creditor, could not enlarge the jurisdiction of the Federal Court, and that a simple contract creditor could not, therefore, maintain an action for receivership in the Federal Courts when the objection was raised by the defendant, but that when the objection was not so raised, the action could be maintained. In that case there was not involved the question of a Federal Court appointing receivers ancillary to a primary proceeding in another jurisdiction, the application there being for a primary appointment. The principle involved in the case of *Pusey & Jones Co. v. Hanssen, supra,* therefore, has no application to the proceedings in the instant case for the appointment of ancillary receivers.

In any event, the objection that the proceedings had been instituted by a simple contract creditor is a defense which may be waived by the defendant and which, when waived, is not available to any other party.

In re Metropolitan Railway Receivership (Matter of Reisenberg), 208 U. S. 90, 52 L. ed. 403, 412;

Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 67 L. ed. 763.

The respondent corporation, in its answer, admitted all of the allegations of the bill and joined in the request for the appointment of receivers, thereby waiving the objection. The court below thus disposed of this contention, relying upon the cases immediately above cited.

In summation of the various objections made by the petitioner to the original Bill of Complaint, we contend that, instead of being nugatory and deficient to the extent that it should be regarded as though no bill of complaint were on file until the amendments were filed, the original Bill of Complaint properly alleged a cause of action for the appointment of ancillary receivers by the District Court. Even conceding, for the purpose of the argument, that the bill contained technical defects, so that the cause of action was not fully alleged, nevertheless it alleged sufficient facts to establish to the District Court that a cause of action existed, and the amendments, which concededly remedied the defects, related back to the time of the original filing. This point we shall discuss under the next heading.

However, before proceeding with this discussion, we desire to deal with a point presented only inferentially and

by implication in petitioner's brief. At the bottom of page 12 of his brief, petitioner speaks of the Bill of Complaint, filed in the District Court, as "a sham pleading". On page 14 the petitioner claims that the bill evidences undue haste in its preparation and filing, reference being made in this connection to the fact that the executive committee of respondent corporation authorized the filing of an answer by the corporation to the contemplated proceedings for ancillary receivership in the District Court in California, on April 18th, 1933, the same date which appeared on the verification of the Bill of Complaint. Again, on pages 23-24 of his brief, petitioner refers to the proceedings in the District Court as brought "by individuals racing into court for a friendly, private receivership on a pretended bill of complaint", for the purpose of defeating the jurisdiction of the State Court. All of these references are correlated with the citation of the case of *Harkin v. Brundage,* 276 U. S. 36, 72 L. ed. 457, a case in which this court upheld the jurisdiction of a State Court as against a Federal Court, upon the ground that the appointment of receivers in the Federal proceedings had been obtained through collusion and a fraud upon both the Federal and State Courts. It is evident, therefore, that petitioner, without essaying a direct attack upon the proceedings because of fraud and collusion, is attempting, by innuendo and implication, to cast upon the proceedings a somewhat sinister and collusive aspect. He makes no claim that all of the facts were not fully and fairly disclosed to the District Court in California, or that any attempt of any nature whatsoever was made to mislead the District Court. The only factual complaint the petitioner voices, and the only complaint he could make on the

facts, is that the primary receivers evidently preferred, for the purposes of an efficient and cooperative liquidation of the entire affairs of the corporation, to have the ancillary receivership administered by the Federal District Court in California rather than by the State Court through the petitioner. That the primary receivers were strictly within their rights in exercising this preference is clear from the case of *In re Metropolitan Railway Receivership (Matter of Reisenberg)*, 208 U. S. 90, 52 L. ed. 403, where this court said (52 L. ed. 413):

> "That the parties preferred to take the subject-matter of the litigation into the Federal courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the Federal court attached, the motive for bringing the suit there is unimportant."

This principle has been reiterated many times.

May Hosiery Mills v. United States District Court, 64 F. (2d) 450 (C. C. A., Ninth);

In re Richardson's Estate, 294 Fed. 349, 359 (D. C. N. D. Tex.);

American Brake S. & F. Co. v. Pere Marquette R. Co., 205 Fed. 14 (C. C. A., Sixth);

Horn v. Pere Marquette R. Co., 151 Fed. 626 (C. C. E. D., Mich.).

Since the petitioner has attempted no direct attack upon the proceedings in the District Court upon the grounds of

collusion, we appreciate that the innuendo contained in his brief, and the foregoing reply thereto are asides, not pertinent to the presentation, and constitute an unwarranted burden upon the court. However, we have not felt justified in permitting the petitioner's innuendo in this connection to go unanswered.

POINT B.

The Bill of Complaint as Amended Was Effective as of the Time of Filing the Original Bill.

As has been stated, petitioner's discussion of the original Bill of Complaint, contained in his brief (pp. 10-17), is preliminary to the one ground upon which he seeks a writ of certiorari from this court. The balance of his brief (pp. 18-23) is devoted to an attempt to maintain the proposition that where a bill of complaint fails to state a cause of action, amendments thereto do not relate back to the time of the filing of the original bill, but that amendments can only relate back where the bill of complaint states a cause of action, but states it, as he says in his brief (p. 18), "imperfectly or defectively". On page 19 of his brief he refers to the case of *Illinois Surety Co. v. United States,* 240 U. S. 214, 60 L. ed. 609, as being a case involving a bill "defectively pleading, but nevertheless pleading" a cause of action. On page 23 of his brief he contends that the court below should have determined whether the original bill of complaint "stated a cause of action defectively, or whether it failed to state any cause of action".

The confusion in petitioner's argument results, in part, from his failure to distinguish between a bill of complaint,

based upon an existing cause of action, but which fails properly to allege it, and a bill of complaint which shows that no cause of action exists at the time the bill is filed. This distinction is, indeed, apparent from petitioner's discussion on pages 18-19 of his brief of the cases of *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U. S. 157, 58 L. ed. 893, and *American Bonding & Trust Co. v. Gibson County,* 145 Fed. 871 (C. C. A., Sixth). In these cases, as petitioner's own discussion discloses, the complaints showed that the respective causes of action had not accrued at the time the complaints were filed, and that the actions were, therefore, prematurely brought. Obviously, since no cause of action existed when the original complaints were filed, amendments thereto could not relate back to the time of the original filing. The distinction is made clear in the decision of this court in *United States ex rel. Texas Portland Cement Co. v. McCord, supra,* where this court said (58 L. ed. 898):

> "As to the effect of the filing of the amendment by the original plaintiffs on January 9, 1911, it is elementary that an amendment dates back to the filing of the petition, and is to supply defects in the cause of action then existing, or at most to bring into the suit grounds of action which existed at the beginning of the case. In this case there was no cause of action to amend."

In support of his argument, petitioner, on pages 20-23 of his brief, cites several cases, all of which were decided by State Courts in the states of Louisiana, Georgia, Arkansas and Texas. The Georgia, Arkansas and Texas cases, cited and quoted from by petitioner, are not authority for his argument. They simply applied the universal

rule that a new and different cause of action from that attempted to be alleged in the original complaint may not be supplied by amendment. The question involved in the Louisiana cases was whether the Louisiana practice permitted amendments at all, where they supplied omissions which rendered the complaint vulnerable to attack for not stating a cause of action.

Contrary to petitioner's contention, the rule is that, where a complaint fails to allege a cause of action but is based upon an existing cause of action, amendments supplying the necessary allegations will be permitted and that the amendments relate back to the date of filing the original complaint. The rule is clearly exemplified in the opinions of this court in *United States ex rel. Texas Portland Cement Co. v. McCord, supra,* above discussed, and in *Illinois Surety Co. v. United States,* 240 U. S. 214, 60 L. ed. 609; *Fleischmann C. Co. v. United States Use of Forsberg,* 270 U. S. 349, 70 L. ed. 624, and *Shields v. Coleman,* 157 U. S. 168, 39 L. ed. 660.

In *Illinois Surety Co. v. United States, supra,* suit was brought under a statute which provided that the action must be instituted not less than six months, nor more than one year after final settlement of certain governmental contracts. The allegation of final settlement was essential to the pleading of a cause of action. This court said (60 L. ed. 615):

> "With respect to the amendment of the complaint, it is apparent that, as there was an existing right of action under the statute at the time the suit was brought, the case was not within the decision in United States *ex rel.* Texas Portland Cement Co. v. McCord, 233 U. S. 157, 58 L. ed. 893, 34 Sup. Ct.

> Rep. 550. No new or different cause of action was alleged in the amended complaint. The court merely permitted the defective statement of the existing right to be corrected by the addition of appropriate allegations, and in this there was no error."

In *Fleischmann C. Co. v. United States Use of Forsberg, supra,* this court said (70 L. ed. 631):

> "It is clear that the amended declaration and petitions did not set up new causes of action, but merely supplemented by appropriate allegations the defective statements of the rights which had existed when the original declaration and petitions were filed; and that the amendments when made related back, by operation of law, to the dates on which the original suit was brought and the original petitions filed."

The opinion of this court in *Shields v. Coleman,* 157 U. S. 168, 39 L. ed. 660, specifically refutes petitioner's claim in this connection. There this court said (39 L. ed. 664):

> "Undoubtedly the circuit court had authority under the bill filed June 6, 1892, to make the order appointing the receiver and taking possession of the property. Even if it were conceded that the bill was imperfect and that amendments were necessary to make it a bill complete in all respects, it would not follow that the court was without jurisdiction."

In the lower Federal Courts, the rule is further exemplified by the many cases which have uniformly held that jurisdictional allegations may be supplied by amendment,

and that, when so supplied, the amendments relate back to the time of the original filing.

Chesapeake & O. Ry. Co. v. Coffey, 37 F. (2d) 320 (C. C. A., Fourth), (Cert. den. 281 U. S. 749, 74 L. ed. 1160);

Interstate Refineries v. Barry, 7 F. (2d) 548 (C. C. A., Eighth);

Bison State Bank v. Billington, 228 Fed. 116 (C. C. A., Fifth);

Baltimore & O. R. Co. v. McLaughlin, 73 Fed. 519 (C. C. A., Sixth);

Bowden v. Burnham, 59 Fed. 752 (C. C. A., Eighth).

In each of these cases the bill of complaint failed to allege diversity of citizenship, which allegation was supplied by amendments to the original bill, and the amendments were held to relate back to the time of the original filing. Petitioner does not make clear what distinction he claims between a failure to allege jurisdictional allegations and a failure to allege a cause of action. As a matter of fact, jurisdictional allegations are as necessary to the pleading of a cause of action in a Federal Court as are any other facts.

Cases arising under the Federal Employer's Liability Act and decided by this court likewise illustrate the rule.

Missouri K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355;

New York Central & H. R. R. Co. v. Kinney, 260 U. S. 340, 67 L. ed. 294.

The opinion of this court in the case of *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62, 77 L. ed. 619, while passing on the sufficiency of an amended claim for tax refund, discussed the analogy afforded by amendments to pleadings.

A recent statement of the rule from the lower Federal Courts is to be found in *Maryland Casualty Co. v. Gerlaske,* 68 F. (2d) 497 (Adv. Sh.) (C. C. A., Fifth), where the court said (p. 499):

> "* * * it is coming to be settled law, certainly in Texas and in the federal courts, that a cause of action is, broadly speaking, the occurrence which gave the litigation rise, and that, if it is set out sufficiently to identify it, it may be freely made more specific by amendment."

To the same effect are the decisions in the state courts.

Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188;
Cowell v. Snyder, 171 Cal. 291;
Rabe v. Western Union Tel. Co., 198 Cal. 290.

In *Ruiz v. Santa Barbara Gas etc. Co.,* 164 Cal. 188, plaintiff sued for wrongful death. The court said (pp. 190, 194-195):

> "The complaint did fail to state a cause of action, in that it failed to allege that the deceased left any heir, an allegation absolutely essential in an action of this character.
>
> * * * * * * * * *

> If the amended complaint did not attempt to set up a new and different cause of action from that attempted to be set up in the original complaint, there is nothing in the contention made by respondent based upon the statute of limitations. Where there is no attempt to state a new cause of action in an amended complaint, but merely the addition of matters essential to make the original cause of action complete, the amendment, though made after the expiration of the period of limitation, relates back to the time of the commencement of the action."

The original Bill of Complaint, we contend, sufficiently alleged a cause of action for the appointment by the District Court of ancillary receivers. In any event, there can be no question that it contained sufficient allegations to establish to the District Court that a cause of action then existed for the appointment of ancillary receivers by that court, and the petitioner makes no effort to deny that the appointment of the primary receivers created a cause of action for the appointment of ancillary receivers by the District Court. If the bill failed to allege all of the facts necessary to set forth this cause of action, these omissions were properly supplied by the amendments filed to the bill, and these amendments were effective as of the time of the original filing, under the cases above discussed.

CONCLUSION.

We respectfully submit that the original Bill of Complaint stated a cause of action for the appointment of ancillary receivers by the District Court; that the bill, as amended, was effective as of the time the original bill was filed; that the court below properly affirmed the orders of the District Court, denying petitioner's Motion to Vacate Receivership and denying petitioner's Motion for Rehearing; and that the Petition for Writ of Certiorari herein should be denied.

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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 54.

E. Forrest Mitchell, Insurance Commissioner of the State of California,
Petitioner,

v.

Bertha E. Maurer and International Re-Insurance Corporation, a Corporation,
Respondents.

RESPONDENTS' BRIEF.

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IN THE

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E. Forrest Mitchell, Insurance Commissioner of the State of California,
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Bertha E. Maurer and International Re-Insurance Corporation, a Corporation,
Respondents.

RESPONDENTS' BRIEF.

In this case a writ of certiorari was granted on October 8th, 1934, directed to the United States Circuit Court of Appeals for the Ninth Circuit. The order of this court, granting the writ, limited the review to the question of the validity of the appointment of ancillary receivers upon the petition of the primary receivers, and directed attention to the case of *McCandless v. Furlaud,* No. 11 on the docket for the 1934 term of this court.

The decree of the court below, to which the writ was directed, affirmed two orders of the District Court of the

United States for the Southern District of California, one of which denied the petitioner's motion to vacate the order of the District Court appointing receivers [R. pp. 50-51], and the other of which denied petitioner's motion for a rehearing of his original motion to vacate [R. p. 69].

I.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is contained in pages 97-133 of the record and is reported in 69 F. (2d) 233.

II.

STATEMENT OF THE CASE.

Respondent International Re-Insurance Corporation is a corporation organized and existing under the laws of the state of Delaware and, prior to April 19th, 1933, conducted an insurance business in practically every state of the United States, including California. [R. p. 4.] On April 19th, 1933, in an action brought by a creditor for the appointment of general receivers in the Court of Chancery in the state of Delaware, in and for New Castle county, entitled "Bertha E. Maurer, plaintiff, vs. International Re-Insurance Corporation, a corporation, respondent," Arthur G. Logan of Wilmington, Delaware, Carl M. Hansen of Philadelphia, Pennsylvania, and George DeB. Keim of Edgewater Park, New Jersey, were appointed receivers for all of the property and assets of said International Re-Insurance Corporation. [R. pp. 30-36.]

Subsequent to their appointmment, said Arthur G. Logan, Carl M. Hansen and George DeB. Keim, as primary receivers of respondent corporation in the state of Delaware, filed, in the District Court of the United States for the Southern District of California, a bill of complaint against International Re-Insurance Corporation for the appointment of ancillary receivers. [R. pp. 3-7.] The allegations of this bill and its amendments will be hereinafter noted.

On April 25th, 1933, with leave of court [R. p. 37], amendments to this bill were filed in the District Court. By these amendments there were added to the original bill and made a part thereof, exemplified copies of the Bill for Appointment of Receivers filed in the Delaware Court of Chancery [R. pp. 20-25] and the order appointing primary receivers in that court. [R. pp. 30-36.]

Subsequent to the filing of the amendments to the bill, and on April 25th, 1933, respondent International Re-Insurance Corporation filed its answer [R. pp. 38-39], by which the allegations of the bill of complaint as amended were admitted and the respondent joined in the request for the appointment of ancillary receivers.

Thereafter the petitioner, who was not a party to the proceeding for the appointment of receivers in the District Court, served and filed a motion to vacate the order appointing receivers, to dissolve the restraining order, to dismiss the petition for the appointment of receivers, and to reexamine the order appointing receivers. [R. pp. 41-

45.] This motion was denied. A subsequent motion for rehearing was made, heard and denied. The writ of certiorari herein is directed to the judgment and decree of the Circuit Court of Appeals for the Ninth Circuit, affirming these orders.

III.

ARGUMENT.

Summary of Respondents' Argument.

Point A.

THE PRIMARY RECEIVERS IN DELAWARE WERE ENTITLED, AS QUASI-ASSIGNEES, TO MAINTAIN THE ACTION AGAINST RESPONDENT CORPORATION FOR THE APPOINTMENT OF ANCILLARY RECEIVERS IN THE FEDERAL DISTRICT COURT.

Point B.

THE APPOINTMENT OF ANCILLARY RECEIVERS UPON THE BILL OF THE PRIMARY RECEIVERS WAS VALID.

1. The Appointment of Ancillary Receivers Upon the Petition of Primary Receivers Has Been Approved by Federal and State Courts.

2. The Federal District Courts, by Virtue of Comity, Have Jurisdiction to Appoint Receivers Ancillary to the Primary Receivership Proceedings, Without Regard to Jurisdictional Requirements.

POINT A.

The Primary Receivers in Delaware Were Entitled, as Quasi-Assignees, to Maintain the Action Against Respondent Corporation for the Appointment of Ancillary Receivers in the Federal District Court.

Since the order of this court, in granting the writ of certiorari, directed attention to the case of *McCandless v. Furlaud*, which is now under consideration by the court, we desire, at the outset, to direct the court's attention to fundamental differences between the facts presented for decision in *McCandless v. Furlaud* and in the instant case and the legal significance of these differences.

In the *McCandless* case the primary receivers were acting under the appointment of a Federal District Court, whereas in the instant case the primary receivers were acting under the appointment of the Delaware Chancery Court. In the *McCandless* case no process was issued against the respondent corporation and no appearance was entered for respondent, while in the instant case the respondent corporation regularly filed its answer, submitted to the jurisdiction of the court and joined in the request for the appointment of ancillary receivers. Because of these differences, we believe that the questions presented for decision in the *McCandless* case are not present in the instant case, and that the primary receivers in the instant case were entitled to maintain and did, in fact, institute and maintain an action for the appointment of ancillary receivers, which was clearly within the jurisdiction of the Federal District Court to entertain.

If we correctly understand the decision of the Circuit Court of Appeals for the Second Circuit in *McCandless v.*

Furlaud, 68 F. (2d) 925, and the issues presented for the decision of this court in the *McCandless* case, the first question was whether a Federal court had jurisdiction to appoint a primary receiver with power to sue outside of the territorial jurisdiction of the court. The facts involved in the instant case remove it from the scope of this question. As we have heretofore pointed out, the primary receivers in the instant case were appointed by the Court of Chancery in the state of Delaware, in and for New Castle county. [R. pp. 30-36.] Under section 3884 of the Revised Code of Delaware of 1915, these receivers were vested with title to all of the property of the corporation, except real property not situated in Delaware. While this court held, in *Booth v. Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164, that the principle of comity was not applicable in the Federal courts to an action brought by a receiver outside the territorial jurisdiction of the court of appointment, this court, by a long line of decisions, has grafted to this rule an exception, that a receiver may maintain such an action where, under the laws of the state of his appointment, he is constituted a quasi-assignee of the property of the insolvent corporation.

Relfe v. Rundle, 103 U. S. 222, 26 L. Ed. 337;

Bernheimer v. Converse, 206 U. S. 516, 51 L. Ed. 1163;

Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749;

Sterrett v. Second Nat. Bank, 248 U. S. 73, 63 L. Ed. 135;

Keatley v. Furey, 226 U. S. 399, 57 L. Ed. 273;

Oakes v. Lake, 78 L. Ed. 15 (Adv. Op.) (Nov. 6, 1933).

Under the above-cited provision of the Delaware law the primary receivers in the instant case were quasi-assignees, within the meaning of this rule.

Ward v. Foulkrod, 264 Fed. 627;

Morris v. Wisconsin Hydro Electric Co., 4 F. Supp. 991.

The other question decided by the Circuit Court of Appeals and presented here in the *McCandless* case was whether or not the proceedings, there in question, constituted a suit or action within the equity jurisdiction of the Federal court, inasmuch as no process was issued and no appearance entered by the respondent corporation. An examination of the instant proceedings discloses that such a suit or action was instituted.

In the instant case, the bill as amended, filed by the primary receivers in the Federal court in California [R. pp. 3-7, 9-38] alleged that the petitioners had been appointed receivers for the respondent corporation in the Delaware proceedings, which proceedings had been brought for the purpose of having receivers appointed for all of the property and assets of the corporation, wherever situated [R. p. 4]; that the corporation owned property and assets in the city of Los Angeles, state of California; that certain creditors of the respondent corporation were threatening suits and attachments against the property of the corporation, and that the corporation had no defense to these threatened suits, and that, if such attachments were levied, irreparable damage would result to the creditors of the corporation and to the primary receivership. [R. p. 5.] The bill, as amended, had attached thereto, and there were incorporated therein by reference, exem-

plified copies of the Bill for Appointment of Receivers in the Delaware court [R. pp. 20-25] and the order appointing the primary receivers in that court. [R. pp. 30-36.] By thus attaching and incorporating by reference the Delaware bill, the bill alleged that the complainant in the Delaware proceedings was a judgment creditor in the sum of $5,000.00 [R. pp. 21-22], that the respondent corporation was possessed of certain property, but was insolvent and was unable to meet its current and maturing obligations as they came due [R. p. 23], and that there were pending against the respondent corporation other suits and judgments which the corporation did not have funds or property available to pay. [R. p. 23.] Also, the allegations of residence showed that the primary receivers were citizens of states other than that of Delaware, and that the respondent was a Delaware corporation. Further, the bill invoked the jurisdiction of the court for the purpose of administering and marshalling the assets of the corporation within the jurisdiction of the court, "taking such steps with respect to the property and assets of said respondent as to this court shall seem meet and proper to protect the interests of the creditors of said respondent in this jurisdiction, and causing the net balance of said property and assets, after such steps as this court may take in the interests of creditors of respondent in this jurisdiction, to be delivered to the court of primary jurisdiction * * * and for the purpose of protecting and preserving the assets of respondent within the jurisdiction of this court from dissipation and waste until

this court makes its final determination on the bill here presented." [R. p. 11.]

Respondent corporation regularly made its appearance in this action by the filing of its answer [R. pp. 38-39], in which the respondent corporation admitted the allegations of the bill and joined in the prayer for the appointment of receivers.

It thus appears that the primary receivers had instituted a suit or action against the respondent corporation, which was clearly within the equity jurisdiction of the court, and that the respondent corporation submitted to the jurisdiction of the court. In view of these facts, the proceedings can in no sense be regarded as summary, *ex parte,* or as a subservient adjunct to the Delaware proceedings. The primary receivers sought to invoke, and the court exercised, the independent equity jurisdiction which the court clearly possessed.

Sands v. E. S. Greeley & Co., 88 Fed. 130 (C. C. A., Second Circuit);

Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9 (C. C. D. Utah);

Rust v. United Waterworks Co., 70 Fed. 129 (C. C. A., Eighth Circuit);

Ward v. Foulkrod, 264 Fed. 627 (C. C. A., Third Circuit);

Seested v. Bonfils, 33 F. (2d) 185 (D. C. D. Colo.);

Trustees System Co. of Pennsylvania v. Payne, 65 F. (2d) 103 (C. C. A., Third Circuit).

Since the bill invoked the jurisdiction of the court first to protect local creditors, it was not subject to the objection, voiced by this court in *Booth v. Clark,* 17 How. 322, 58 U. S. 322, 15 L. Ed. 164; *Great Western M. & M. Co. v. Harris,* 198 U. S. 561, 49 L. Ed. 1163, and in *Sterrett v. Second Nat. Bank,* 248 U. S. 73, 63 L. Ed. 135, to the effect that if a foreign receiver were permitted, by reason of comity, to sue and recover property or funds and withdraw them from the jurisdiction, local creditors would be prejudiced. In fact, the procedure adopted explicitly conformed to the law as interpreted by this court in *Sterrett v. Second Nat. Bank, supra,* where it was said (63 L. Ed. 137):

> "Since the decision of this court in Booth v. Clark, 17 How. 322, 15 L. ed. 164, it is the settled doctrine in Federal jurisprudence that a chancery receiver has no authority to sue in the courts of a foreign jurisdiction to recover demands or property therein situated. The functions and authority of such receiver are confined to the jurisdiction in which he was appointed. The reasons for this rule were fully discussed in Booth v. Clark, and have been reiterated in later decisions of this court. * * * This practice has become general in the courts of the United States, and is a system well understood and followed. It permits an application for an ancillary receivership in a foreign jurisdiction where the local assets may be recovered, and, if necessary, administered."

Although, as we have pointed out, we believe the bill contained all of the essential allegations to invoke the

equity jurisdiction of the court, if the bill was in any way deficient in this connection, the defects were waived by the answer of the respondent corporation.

Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 500, 67 L. Ed. 763;

Re Metropolitan Railway Receivership, 208 U. S. 90, 52 L. Ed. 403.

Also, any objection that non-residents of California were suing a Delaware corporation in a Federal court in California was waived by the answer of the respondent.

Central Trust Co. v. McGeorge, 151 U. S. 129, 132, 38 L. Ed. 98.

On this phase of the argument, therefore, we submit that the primary receivers in the Delaware court of chancery were quasi-assignees of the property of the corporation under the Delaware law, and as such were entitled to institute and maintain an action in the Federal court in California, and that they actually did institute an action against the respondent corporation which was within the jurisdiction of the Federal court to entertain. The brief of respondents in the *McCandless* case, it is interesting to note, concedes the rules of law hereinabove discussed and their application to the instant case, and there is nothing in the decision of the Circuit Court of Appeals in that case that could be construed as authority against the proceedings in the instant case.

POINT B.

The Appointment of Ancillary Receivers Upon the Bill of the Primary Receivers Was Valid.

1. THE APPOINTMENT OF ANCILLARY RECEIVERS UPON THE PETITION OF PRIMARY RECEIVERS HAS BEEN APPROVED BY FEDERAL AND STATE COURTS.

While, for the reasons discussed under the foregoing Point A, we regard it as unnecessary to invoke the rule, we, nevertheless, believe it to be the rule in the Federal courts, that a primary receiver may properly make application to a Federal court for the appointment of ancillary receivers, which application may be granted by the court, as a matter of comity, and that this procedure is not within the prohibition of *Booth v. Clark, supra,* and its companion cases. While the case of *Sterrett v. Second Nat. Bank, supra,* cannot be cited as direct authority for this rule, we believe the language above quoted, from the opinion of this court in that case, infers approval of this rule. So far as we have been able to ascertain, this court has not otherwise had occasion to consider the point.

However, the rule has been approved in a number of cases in the lower Federal courts.

Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9 (C. C. D. Utah);

Ward v. Foulkrod, 264 Fed. 627 (C. C. A., Third Circuit);

Coal & Iron Ry. Co. v. Reherd, 204 Fed. 859 (C. C. A., Fourth Circuit);

Coltrane v. Templeton, 106 Fed. 370 (C. C. A., Fourth Circuit);

Seested v. Bonfils, 33 F. (2d) 185 (D. C. D. Colo.);

Abm. S. See & Depew v. Fisheries Products Co., 9 F. (2d) 235 (C. C. A., Second Circuit);

Brooks v. Smith, et al., 290 Fed. 33 (C. C. A., First Circuit);

Bluefields S. S. Co. v. Steele, 184 Fed. 584, 586-587 (C. C. A., Third Circuit);

Platt v. Philadelphia & R. R. Co., 54 Fed. 569 (C. C. D. Mass.).

In *Shinney v. North American Savings, Loan & Building Co.*, 97 Fed. 9, a primary receiver was appointed by the state court in Minnesota. This receiver then made application for his appointment as ancillary receiver in a proceeding in the state of Utah which had been instituted in the state court and removed to the Federal court. The court said (p. 11):

> "It is admitted that, when a receiver is once appointed by a federal court, other federal courts, through comity, will usually appoint the same person as receiver of the assets within their jurisdiction; but it is argued that, where the appointment is first made by a state court, federal courts are without power to act, in conformity with the principle of comity. No reason for such a distinction is apparent. The state court is of co-ordinate jurisdiction in such matters with the federal court sitting in the same locality. As between the parties, its determination of the insolvency of the corporation and of the need for a receiver is just as conclusive as if had in a federal court. The need for a uniform administration of the assets of an insolvent corporation inheres in the principles of equity, and does not vary with the forum first invoked. It is no unusual thing

for a federal court to appoint an ancillary receiver of assets within its jurisdiction in aid of a primary appointment by a state court of another state."

In *Coltrane v. Templeton,* 106 Fed. 370, in considering the validity of the appointment of ancillary receivers by a Federal court, it was said (pp. 374-375):

> "The bill in this case is styled an 'ancillary bill.' Technically it is not an ancillary bill. The term 'ancillary bill' is applicable to a proceeding growing out of original proceedings in the same court, dependent on such proceedings, and instituted for the purpose of enforcing the judgment, or of rendering complete justice among all the parties in interest. * * * It is more properly an auxiliary bill filed to assist another circuit court in the administration and distribution of assets in a cause properly before it. The circuit courts of the United States, by reason of the comity existing between them, entertain such bills, and give all the assistance in their power to the court in which the bill was filed originally. The extent of the jurisdiction of the courts entertaining such auxiliary bills, and how far they will exert an independent function, is not clearly determined. Mr. Justice Harlan and Judge Jackson, in this circuit, in Mercantile Trust Co. v. Kanawha & O. R. Co. (C. C.) 39 Fed. 337, denied that this court could take jurisdiction in such cases. That case, however, was for the foreclosure of the mortgage covering a railroad in the district of West Virginia, and the bill filed in the circuit court of that district did not contain proper averments justifying such a decree. In the First circuit, in Platt v. Railroad Co. (C. C.) 54 Fed. 569, it is stated that the practice in other districts is to entertain such bills and to act upon them generally *ex parte* and without argument."

In *Coal & Iron Ry. Co. v. Reherd,* 204 Fed. 859, a receiver of a partnership was appointed in Virginia. The receiver then sued a debtor of the partnership in a Federal court in West Virginia. While this suit was pending, the receiver filed a bill for the appointment of ancillary receivers in the Federal court in West Virginia. While the complainants in the primary receivership were named as complainants in the ancillary suit in West Virginia, the primary receiver was the moving party in the filing of the bill. The court said (p. 882):

> "It seems to be settled, therefore, that this receiver, who was appointed in a Virginia court, was not authorized in the outset to institute his action in the United States Court in the Northern District of West Virginia; but the plaintiff undoubtedly, from his subsequent action, undertook to cure this defect by going into Randolph county, W. Va., after the suit had been begun, and filing an ancillary bill, under which an order ratifying his appointment as receiver was made, * * *.
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> The question then presented is as to whether this proceeding, taken after the suit had been actually instituted, would have the effect for which it was intended. It occurs to us that in this situation the position of the defendant becomes one of extreme technicality. Undoubtedly, if the plaintiff had filed his ancillary bill in the state court of Randolph county, W. Va., and his appointment as receiver had been ratified, and authority given to bring the suit, the proceeding herein would have been regular and the question of jurisdiction eliminated."

In *Ward v. Foulkrod,* 264 Fed. 627, a receiver was appointed by a Delaware Court of Chancery. This receiver then petitioned a Federal court in Pennsylvania to discharge a receiver for the corporation appointed by that court and to turn over the assets held by that receiver to the petitioner, as Delaware receiver. The court held that the Delaware court had prior jurisdiction over the Federal court in Pennsylvania, but that the Delaware receiver should have applied for the appointment of ancillary receivers in the Federal court in Pennsylvania. The court said (pages 636-637):

> "While a court of the domicile of a corporation may appoint a receiver and authorize him to take possession of its property in a foreign jurisdiction, as did the court in this case, the doctrine seems universal that the appointment confers no legal authority which the receiver can, unaided and alone, exert over the property in that jurisdiction. What then is to be done?
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> * * * * * * * * *
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> This is the rule of comity which impels the court of foreign jurisdiction to render aid to the court of primary jurisdiction in the administration of the corporation's assets by appointing on application ancillary receivers. 23 R. C. L. pp. 140-148. Of course, in yielding to this rule, the court to which application is made has the right to determine for itself who the ancillary receivers shall be. While a court when acting in comity to a distant court of coordinate jurisdiction will be careful to appoint receivers amenable to its control, it usually appoints, for obvious reasons, at least one of the receivers appointed by

the domiciliary court to act with one of its own selection.

The appropriate proceeding in such a case as this (which is readily distinguishable from O'Neil v. Welch, *supra,* and similar cases where the foreign court had no rights to be preserved) is not by application of the receivers appointed by the court of primary jurisdiction addressed to the court of foreign jurisdiction that it summarily discharge its receiver and direct him to turn over to them the corporation's property in his hands, but it is by application to that court praying it to discharge its receiver after he has passed his account and appoint ancillary receivers. When the prayer of such a petition has been granted and ancillary receivers have been appointed, all rights, those of the domiciliary court and of the foreign court, and of all stockholders and creditors of the corporation in both jurisdictions, will fall into their proper places and will be duly cared for and protected in the orderly administration of the estate. If such an application had been made in this case, we apprehend the District Court would have recognized and have acted upon the rules we have discussed. But as the application that was made was not one to which the District Court was required to respond by yielding its jurisdiction in the manner demanded, we find that its action was without error and that its decree should be affirmed.

In order, however, that there shall be no misunderstanding as to what we consider to be the rights of the receivers of the state court in future appropriate proceedings looking to the appointment of ancillary receivers in jurisdictions foreign to that of their appointment, we direct that the order appealed from be modified so as to provide that the dismissal

of the petition shall be without prejudice to the rights of the Delaware receivers to institute appropriate proceedings for the appointment of ancillary receivers for the property of the corporation now in the hands of the receiver appointed by the District Court of the United States for the Eastern District of Pennsylvania."

The rule has been expressly approved in state courts.

Bodge v. Skinner Packing Co., 115 Neb. 41, 211 N. W. 203.

The decision of the Circuit Court of Appeals in the *McCandless* case, in stating the rule that a receiver cannot sue in a foreign jurisdiction and in citing *Booth v. Clark, supra,* fails, we submit, to recognize the significance of the rationale of the decision of this court in that case, and to note the distinction between a suit by a foreign receiver to recover funds or property which will, if recovered, be removed from the jurisdiction to the prejudice of local creditors, and a suit for the appointment of ancillary receivers. This distinction is important, as was recognized by the Circuit Court of Appeals in its decision in the instant case. (69 F. (2d) 233, 235-236.) As said in that decision, the prohibition imposed by the holding in *Booth v. Clark*, to the effect that a receiver could not sue in a foreign jurisdiction, was for the benefit of local creditors and applied only when the attempted suit was for the purpose of removing property from the jurisdiction. The opinion in *Booth v. Clark* so indicated, and

subsequent decisions of this court have confirmed this principle.

Great Western Mining Co. v. Harris, 198 U. S. 561, 49 L. Ed. 1163;

Hale v. Allison, 188 U. S. 56, 47 L. Ed. 380;

Sterrett v. Second National Bank, 248 U. S. 73, 63 L. Ed. 135;

Keatley v. Furey, 226 U. S. 399, 57 L. Ed. 273.

Neither the reason for the rule of *Booth v. Clark,* nor the rule itself has any application to a suit for the appointment of ancillary receivers, since proceedings for the appointment of ancillary receivers are expressly designed for the dual purpose of protecting local creditors and of cooperating with the primary receivership proceedings, as is witnessed by the relief sought in the instant case.

The few Federal cases, cited in this connection by the Circuit Court of Appeals in the *McCandless* decision, are readily distinguishable.

In *Hilliker v. Hale,* 117 Fed. 220, a state receiver sued in a foreign jurisdiction to recover on a statutory stockholders' liability. The court correctly applied the rule of *Booth v. Clark.*

In *Mercantile Trust Co. v. Kanawha & O. Ry. Co.,* 39 Fed. 337, the same complainant in the primary proceedings brought the ancillary proceedings. Thus the point was not raised or considered.

In *Green v. Star Cash & Package Car Co.,* 99 Fed. 656, a Federal District Court in Connecticut refused to appoint

ancillary receivers upon the petition of a primary receiver, but based its refusal upon a ground other than that of the fact that the primary receiver was the petitioner.

In *In re Brant,* 96 Fed. 257, it does not appear who the petitioner for the appointment of a receiver was, or that the application was for an ancillary appointment. The court said that there was no defendant in the suit, and hence no case pending in which a receiver could be appointed.

In *Fairview Fluor Spar & Lead Co. v. Ulrich,* 192 Fed. 894, a creditor, not a primary receiver, filed an *ex parte* bill in a Federal court in Illinois without joining the corporation as a party, and sought the appointment of a receiver ancillary to a receivership proceedings in another Federal court. The court held that since there was no defendant in the suit, the bill was a nullity.

Under the authorities above discussed, we submit that, even if the primary receivers had not been entitled to sue as quasi-assignees, they were entitled to invoke, upon their own petition, the jurisdiction of the Federal court in California, to appoint ancillary receivers in an independent action brought for that purpose, and that the court had the requisite jurisdiction to make such appointment.

This conclusion is necessarily confirmed by the many cases, hereinafter discussed under the next point, which have uniformly held that the Federal courts have jurisdiction to appoint receivers ancillary to a receivership proceeding in another jurisdiction, apart from the usual jurisdictional requirements of the amount involved in the suit and diversity of citizenship.

2. THE FEDERAL COURTS, BY VIRTUE OF COMITY, HAVE JURISDICTION TO APPOINT RECEIVERS ANCILLARY TO A PRIMARY RECEIVERSHIP PROCEEDINGS WITHOUT REGARD TO JURISDICTIONAL REQUIREMENTS.

It has been repeatedly and uniformly held that a Federal court has jurisdiction to appoint receivers ancillary to a receivership proceeding in another jurisdiction, without regard to the usual requisites of jurisdictional amount and diversity of citizenship.

Sands v. E. S. Greeley & Co., 88 Fed. 130 (C. C. A. Second Circuit);

Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9 (C. C. D. Utah);

Rust v. United Waterworks Co., 70 Fed. 129 (C. C. A. Eighth Circuit);

Bluefields S. S. Co. v. Steele, 184 Fed. 584 (C. C. A. Third Circuit);

Ward v. Foulkrod, 264 Fed. 627 (C. C. A. Third Circuit);

Bluefields S. S. Co. v. Steele, 192 Fed. 23 (C. C. A. Third Circuit);

Seested v. Bonfils, 33 F. (2d) 185 (D. C. D. Colo.);

Trustees System Co. of Pennsylvania v. Payne, 65 F. (2d) 103 (C. C. A. Third Circuit);

Walker v. United States Light & Heating Co., 220 Fed. 393 (D. C. S. D. N. Y.);

Reed v. Alaska Mines Corporation, 6 Alaska 370.

Federal courts will make such ancillary appointment not only when based upon proceedings in other Federal courts,

but also when based upon primary proceedings in a state court.

Sands v. E. S. Greeley & Co., 88 Fed. 130;
Shinney v. North American Savings, Loan & Building Co., 97 Fed. 9;
Rust v. United Waterworks Co., 70 Fed. 129;
Seested v. Bonfils, 33 F. (2d) 185.

The theory of these cases is that an order, appointing a receiver in a court of primary jurisdiction, is entitled to full faith and credit, and that the Federal court will make an appointment of receivers ancillary to the primary proceedings by virtue of the doctrine of comity.

The same principle has been applied in the state courts where, under the doctrine of comity, one court will appoint receivers ancillary to receivership proceedings in another state, without regard to the question of jurisdiction.

Southern Colonization Co. v. Parten, 83 Fla. 300, 91 So. 263;
Bodge v. Skinner Packing Co., 115 Neb. 41, 211 N. W. 203.

It is apparent, under these cases, that, in this connection, the Federal courts are exercising an inherent equity jurisdiction to which the usual requirements of jurisdictional amount and diversity of citizenship are not requisite. To hold that the Federal courts have no jurisdiction to appoint ancillary receivers upon the application of primary receivers, for the reason that such jurisdiction is not expressly conferred by the Constitution of the United States, or by the pertinent statutes of Congress, would have the result of overruling the immediately above mentioned cases and of denying the principle upon which those decisions are based.

CONCLUSION.

Cogent practical considerations for the affirmance of the judgment of the Circuit Court of Appeals in this case have been presented to this court in petitioner's brief and petitioner's reply brief in the *McCandless* case, and it is therefore unnecessary to reiterate them here.

We submit that, aside from such practical considerations, and apart from the questions presented in *McCandless v. Furlaud,* the primary receivers, for the reasons herelu discussed, properly instituted and were entitled to maintain the action for the appointment of ancillary receivers in the Federal court in California, and that the judgment of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 54.—October Term, 1934.

E. Forrest Mitchell, Insurance Commissioner, Petitioner, *vs.* Bertha E. Maurer and International Re-Insurance Corporation.	On Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 3, 1934.]

Mr. Justice Brandeis delivered the opinion of the Court.

International Re-Insurance Corporation is organized under the laws of Delaware. It had a place of business and real and personal property in California. On April 19, 1933, the Court of Chancery of Delaware appointed Arthur G. Logan of that State, Carl M. Hansen of Pennsylvania, and George deB. Keim of New Jersey, primary receivers of all its property. The statutes of Delaware purport to vest in receivers so appointed title, as quasi-assignees, to all property, wherever located, except real estate not situated within the State. R. S. Del. § 3884. The order appointing the primary receivers authorized them to apply in other jurisdictions for the appointment of ancillary receivers. On the day of their appointment, they filed, in the federal court for southern California, a petition, or bill, praying that ancillary receivers be appointed of property there located. The prayer was granted *ex parte*. W. H. Comstock of California and deB. Keim were appointed ancillary receivers. And an order issued enjoining all persons from interfering with their possession and control.

On the same day, E. Forrest Mitchell, the Insurance Commissioner of California, filed, in the Superior Court of that State, a petition praying that he be placed in the possession of the property and business of the Corporation. That court entered immediately an order temporarily enjoining the Corporation from disposing of its property in California; and ordered the Insurance Commissioner to take possession thereof. Its license to transact the business of workmen's compensation insurance in California had been revoked by the Commissioner prior to the appointment of the primary receivers.

Service was promptly made of the orders issued by the two courts. A dispute arose as to the exact times of the filing of the several proceedings; of the entry of the orders; of the service thereof; and of taking possession. To resolve the controversy, the Insurance Commissioner filed in the federal court, on May 2, 1933, a motion to vacate its order appointing the ancillary receivers; to dissolve the restraining order; and to dismiss the petition of the primary receivers. The motion alleged that, before the federal court assumed to act, the California court had acquired jurisdiction and the Insurance Commissioner had actually taken possession of the Corporation's property. It charged, among other things, that the petition of the primary receivers on which the appointment of the ancillary receivers had been made, did not state facts sufficient to give the court jurisdiction of the subject matter or of the parties; and that both the order of appointment and the restraining order were, therefore, invalid.

At the hearing of the motion, it was admitted that "the situation presented is within the California statute providing for proceedings against delinquent insurance companies"; that the California assets of the Corporation "were in the possession of the Insurance Commissioner at the time of the appointment and qualification of the receivers appointed by the district court"; and that the proceeding brought by the primary receivers had been filed a few minutes before the Insurance Commissioner made his application to the state court. On these facts, the District Court held, that since the proceeding brought by the primary receivers was "first filed in this court, jurisdiction of the *res* is in the district court". Upon a rehearing had on additional affidavits, the court re-affirmed its denial of the motion to vacate the order appointing the ancillary receivers.

From this judgment, the Insurance Commissioner appealed to the Court of Appeals. There he contended that the original proceedings, in which the primary receivers petitioned for the appointment of ancillary receivers, was not a bill of complaint and was insufficient to confer jurisdiction upon the District Court; cf. *McCandless* v. *Furlaud,* 68 F. (2d) 925;[1] that the subsequent amendments purporting to state a cause of action against the Corporation, were inoperative to sustain the jurisdiction of the federal

[1]For disposition of the case by this Court, see 293 U. S. —.

court because they were not filed until after the state court had acquired possession of the property; and that the bill, even as amended, did not state a cause of action in which a valid order appointing ancillary receivers could be made.

The Court of Appeals, in an elaborate opinion, affirmed the judgment of the District Court, 69 F. (2d) 233. It did not pass upon the Commissioner's contention that the ancillary appointment could not be made upon the bill as it was originally filed, because it held that the subsequent amendments related back to the commencement of the proceedings. It overruled his objection that the bill failed to allege that the Corporation was insolvent or that the complainant in the primary suit was a judgment creditor, on the ground that any such defects were cured by the amendments or waived by the Corporation's answer. It held that the rule of *Booth* v. *Clark*, 17 How. 322, did not prevent the appointment of ancillary receivers, because here the primary receivers did not ask that they themselves be appointed ancillary receivers, and did ask specifically that the "rights of creditors in the foreign jurisdiction be safeguarded". It concluded that the state and federal courts had concurrent jurisdiction of the subject matter; and that the federal court was entitled to exercise its jurisdiction, because of the prior filing in it of the proceedings for the appointment of ancillary receivers.

Although the Court of Appeals discussed, also, questions of federal jurisdiction and venue, it did not refer specifically to the fact that a lack of diversity of citizenship appeared affirmatively, on the amended pleadings, one of the primary receivers as well as the Corporation being a citizen of Delaware. Nor was this fact relied upon by the Insurance Commissioner in his petition for certiorari or in oral argument here. He prayed for the writ solely on the ground that the Court of Appeals should have decided that "the original bill filed in the District Court was insufficient to state a cause of action or to confer jurisdiction"; and that the amendments thereto filed after the commencement of the suit in the state court could not operate to cure the defects of the original bill. But, as the lack of diversity of citizenship appears upon examination of the record, we have no occasion to pass upon the contentions made. The order appointing the ancillary receivers must be set aside because the District Court lacked federal jurisdiction of the cause.

First. If the jurisdiction of the District Court must rest on diversity of citizenship, it fails because one of the plaintiffs is a citizen of the same state as the defendant. *Hooe* v. *Jamieson*, 166 U. S. 395. The proceeding in the District Court was entitled "Bertha E. Maurer v. International Re-insurance Corporation"; and that title has been used in all later proceedings in that court, in the Court of Appeals and in this Court. If Bertha E. Maurer had actually been the plaintiff, there would have been diversity of citizenship; for she is a citizen of New Jersey. But, in fact, Bertha E. Maurer was not a party to the application for the appointment of the ancillary receivers; was not later made a party to the suit; and has not appeared at any stage of the proceedings. Her name was used, doubtless, because she was the plaintiff in the suit against the Corporation brought in the Court of Chancery of Delaware in which the primary receivers were appointed.[2] The application in the case at bar for the appointment of ancillary receivers was made by, and in the name of, the primary receivers. They sue as quasi-assignees claiming to be entitled to the possession of the balance of the California property after its administration by the District Court of California. In the original application filed April 19, 1933 they called themselves petitioners. In the amendments filed six days later, the application is called a "bill of complaint". It is so designated in the answer of the Corporation, filed at the same time. We necessarily treat the primary receivers as the plaintiffs.

Second. Apparently this lack of diversity jurisdiction was regarded as immaterial by the Court of Appeals, on the ground that the suit was an ancillary one. For the opinion states: "Finally it has been held that an ancillary suit in a Federal court does not depend on diverse citizenship". This position is adopted in the brief of the primary receivers, but the contention is unsound. Where the jurisdiction of a federal district court is based upon diversity of citizenship, proceedings therein in intervention being ancillary, the jurisdiction rests upon that of the main cause. *Cincinnati, etc. R. R. Co.* v. *Indianapolis, etc. Ry. Co.*, 270 U. S. 107. The same rule is applicable to sustain jurisdiction of independent suits which are ancillary to an original suit in the same

[2]Similarly, in McCandless v. Furlaud, 293 U. S. —, the petition for the appointment of ancillary receivers filed by the primary receivers in the federal court for southern New York, bore the title of the suit in the federal court for western Pennsylvania which appointed them.

court. *White* v. *Ewing*, 159 U. S. 36. Whether the rule may ever be applied to a suit brought in a federal court of another district; and whether a suit for the appointment of ancillary receivers in another federal district is an ancillary suit within the meaning of the rule does not appear to have been decided by this Court.[3] We need not decide either question now. For the rule can have no application where primary receivers appointed by a state court bring a suit for the appointment of ancillary receivers in the federal court for another State. Obviously such an application is not ancillary to any proceedings in any federal court. It is an independent original bill. Being such, it cannot be sustained when diversity of citizenship does not exist and no other ground of federal jurisdiction is shown.

Third. Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review.[4] *Mansfield, etc. Ry. Co.* v. *Swan*, 111 U. S. 379, 382. Hence, the failure of the Insurance Commissioner to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention of this Court the lack of diversity of citizenship are immaterial. The Court of Appeals pointed out that under Judicial Code § 274c, where "jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought . . . though defectively alleged, either party may amend at any stage of the proceedings and in the appellate court upon such terms as the court may impose." But, in the case at bar, the admitted facts

[3] In Raphael v. Trask, 194 U. S. 272, 278, it is intimated that the jurisdiction of a federal court cannot be based upon an original suit in another federal court. Some of the lower courts have so held. Winter v. Swinburne, 8 Fed. 49, where the subject was fully discussed. Compare United States v. Pedarre, 262 Fed. 839; Sullivan v. Swain, 96 Fed. 259. But see Bluefields S. S. Co. v. Steele, 184 Fed. 584, 587. Compare Trustees System Co. of Pennsylvania v. Payne, 65 F. (2d) 103, and Walker v. United States Light & Heating Co., 220 Fed. 393, which concern requisites of equity, rather than federal, jurisdiction.

[4] The order appointing ancillary receivers attacked in McCandless v. Furlaud, 293 U. S. —, on the ground that the court was without federal jurisdiction, had been entered, not in the suit there under review, but in a separate proceeding in the same court.

preclude such an amendment. Diversity of citizenship confessedly did not exist.

The judgment is reversed; and the cause is remanded to the District Court with directions to dismiss the bill for want of federal jurisdiction.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.